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No. 80-1329

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

FIDEL RAMOS, *et al.*,
Petitioners,

vs.

RICHARD D. LAMM, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

(1) WHETHER A DISTRICT COURT, AS PART OF A REMEDIAL DECREE, CAN ORDER STATE OFFICIALS TO DEVISE A PLAN TO ADDRESS CONDITIONS OF IDLENESS AND INEFFECTIVE CLASSIFICATION IN PRISON CASES WHERE THE TOTALITY OF CONDITIONS WERE FOUND TO DEPRIVE INMATES OF MINIMUM CONSTITUTIONAL GUARANTEES TO ADEQUATE SHELTER, SANITATION, FOOD, MEDICAL CARE AND PERSONAL SAFETY AND WHERE THE CONDITIONS OF IDLENESS AND INEFFECTIVE CLASSIFICATION WERE FOUND TO CONTRIBUTE TO THE CONSTITUTIONAL VIOLATIONS.

PARTIES

The Petitioners in this action are Fidel Ramos, David Lee Anderson, Sadiki Lisimba Ajamu (a/k/a/ Eugene Collins), Alexander Roses, Mark Menchetti, and Lester Lazenby, the named plaintiffs in the courts below for a class of all those persons who are now or may in the future be confined at the maximum security unit ("Old Max"), or the new maximum and new close security prisons of the Colorado Department of Corrections.

The respondents are Richard D. Lamm, Governor of Colorado; James Ricketts, Executive Director of the Department of Corrections; John Perko, Director of the Division of Adult Services; Edgar Fox, Director of the Division of Correctional Industries; and William Wilson, the Superintendent of "Old Max."

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DECISION BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is unreported. (A. 1). The decision of the United States District Court for Colorado is reported at 485 F.Supp. 122 (D.Colo. 1979). (A. 62).

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered September 25, 1980. Cross petitions for rehearing were denied on November 10, 1980. Jurisdiction is conferred by 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment VIII to the Constitution of the United States prohibiting cruel and unusual punishment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

made applicable to the states by Section 1 and 5 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

and enforced by Title 42, Section 1983, United States Code:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at

law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In November, 1977, Fidel Ramos filed a *pro se* civil rights action under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) alleging that the conditions of confinement at the maximum security prison in Colorado ("Old Max") violated the Eighth Amendment to the United States Constitution. Counsel entered the case and it was certified as a class action. After extensive discovery and months of efforts to reach a settlement, the case proceeded to trial. The trial began on October 15, 1979 and lasted for 5 weeks. On December 20, 1979, the District Court entered an extensive opinion and order finding, *inter alia,* that the totality of conditions under which the prisoners were housed constituted cruel and unusual punishment under all tests by all known measures of proof enunciated by this Court. *Ramos v. Lamm,* 485 F.Supp. 122, 154 (D.Colo., 1979). (A. 121-123).[1]

The facts before this Court are not in dispute. The Court of Appeals did not set aside any of the findings of the trial court as clearly erroneous. A brief recitation of the facts is set forth simply to explain the basis for the remedial order and the question presented in this petition.

Old Max is an antiquated, outdated, unmanageable prison. Dating back to the late 1800's, it shows scars left by generations of neglect. (A. 74) The main living areas are "unfit for human habitation." (A. 15) Conditions in which inmates are confined are "grossly inadequate": cellhouses are in a serious state of disrepair and are

[1]Hereafter, all references to the opinions of the courts below will be cited to the Appendix to this Petition and designated A._____.

characterized by leaking roofs, excessive odors, heat and humidity due to inadequate ventilation and temperature controls, leaking pipes, defective plumbing, and accumulations of raw sewage, extensive rodent and insect infestation, trash, decayed food and other assorted litter. (A. 15-21) Most cells provide for barely one half the square footage required by modern correctional standards. (A. 77)

The majority of prisoners at Old Max are locked in their cells for more than 20-23 hours per day over extended periods of time. (A. 18, 85-6, 123) Many of these prisoners are forced to endure these conditions not because they committed disciplinary violations but because respondents failed to provide constructive activities. (A. 85-6, 127-8) Small cells in which inmates are confined, along with deteriorating and unsanitary conditions in the main living areas, were found to have a direct detrimental impact on the health and mental stability of the inmates. (A. 17-19) Respondents' deliberate indifference to petitioners' serious medical and mental health needs presented such a dangerous situation at the time of trial that the Court of Appeals and the District Court considered it an emergency situation. (See generally, A. 30-39, 95-106)

The prisoner population continues to be plagued with violence and fear of violence with efforts of many prisoners being directed at merely staying alive. Respondents records reveal an "extraordinarily high" number of stabbings, assaults, fights and threats and an "inordinately high number of suicides and self-mutilatory gestures." (A. 25-29, 91-95) Between January 1978 and May 1979, more than 91 incidents of suicide and self-inflicted wounds were reported. (Pl. Exh. 64)

The District Court found that the classification process in Colorado was "completely ineffectual" as a method for

prison officials to protect and afford prisoners other rights such as safety and medical care. (A. 113, 134-7) Large numbers of young offenders who were diagnosed for the reformatory were placed in the violent atmosphere of Old Max. Prisoners identified as in need of protective custody were routinely placed in the same cellhouses as aggressors and were subjected to stabbings and assaults. (A. 26-9) Weaker prisoners who were diagnosed as having severe mental illness were warehoused in debilitating conditions alongside aggressive prisoners, who were found to take brutal advantage of them. (A. 102-3) Medical and psychiatric experts cited numerous examples of prisoners who had been denied adequate medical and mental health care even though they were identified as having serious medical and psychological problems (Rundle R. Vol. 21, pp. 118-20, 158-66).

One inmate who was diagnosed upon admission as having a serious heart condition was placed directly in one of the idle cellhouses and died before receiving medical attention. (A. 98) Other inmates who were diagnosed as acutely psychotic, suicidal and retarded were routinely placed in the most restrictive cellhouse where no activities or treatment are provided; four of these inmates took their lives in a two-month period. (A. 103)

The District Court found that forced idleness and prolonged daily confinement in cells without adequate opportunities for exercise or productive activity increased violence and caused needless physical and mental suffering and "irreparable disabilities." (A. 83-86, 126-131) The American Correctional Association found that idleness was responsible for more problems at Old Max than any other factor. (A. 84) The state's own reports identify idleness and lack of constructive activity as a cause of the 1975 prison riot. (A. 84) Every corrections expert, including former Colorado Executive Director of Correc-

tions Allen Ault, testified that idleness leads to more disciplinary violations and violence. (Ault R. Vol. 30, pp. 119, 124; Clements R. Vol. 26, p. 48; Fogel R. Vol. 20, pp. 129-30, 134; Conrad, R. Vol. 23, pp. 38-40). Moreover, experts agreed that unrelenting idleness and prolonged confinement in cells without productive activity causes emotional and psychological deterioration, a deterioration of social skills, a distortion of self-image, and a loss of muscle tone, physical strength and endurance. (Clements R. Vol. 26, p. 47-48; Rundle R. Vol. 21, p. 153-4; Conrad R. Vol. 23, pp. 23, 28-31, 38-39, 44, 56-57) In this case, the high level of sensory deprivation that results from housing prisoners in a total isolation environment led prisoners to decompensate to such a low level that many were compelled to make suicidal and self mutilatory gestures. (A. 100)

Having found that these and other conditions taken as a whole subjected prisoners to cruel and unusual punishment, the District Court ordered prison officials to produce their own remedial plan calculated to cure the constitutional violations found consistent with certain principles that the court issued identifying 5 areas of change that would remedy the worst evils. (A. 158-160)

The Court of Appeals, acting on a motion by prison officials, granted a stay of the District Court's order, except as to medical care, pending expedited appeal.

On September 25, 1980, the Court of Appeals issued its opinion and order. The Court of Appeals affirmed that the District Court applied the correct constitutional standard in making its finding that the totality of conditions violated the Eighth Amendment and held that in the core areas of shelter, sanitation, food, personal safety and medical care the District Court's findings and conclusions were entirely supported by the record. (A. 14-15)

Without reversing any of the trial court's factual findings regarding the nature and extent of the violation and without overturning any relevant conclusions of law, the Court of Appeals vacated 3 of the principles which the District Court issued to guide the state's formulation of a remedial plan to address the constitutional violations. The principles which the appellate court vacated addressed the areas of idleness; lack of motility (excessive restrictive confinement in small cells and deteriorating conditions); and ineffective classification. (A. 13, 57-8). In addition, the Court of Appeals vacated the District Court's remedial order, except as to medical care, on the basis of statements as to "changed conditions" made outside the record at oral argument and remanded the case for further proceedings. (A. 57-58)

The Court of Appeals denied both parties' petitions for rehearing on November 10, 1980. (A. 59) State officials applied to the Court of Appeals for a stay; their application was denied on December 2, 1980. The State's petition to recall the mandate and reinstate the stay previously issued was denied by Mr. Justice White on December 9, 1980.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

A. Conflicts With Decisions of This Court

(1) The opinion and order of the Court of Appeals vacating certain remedial principles which the District Court issued to guide the state's formulation of a remedial plan is contrary to the general principles which this Court has enunciated governing the equitable powers of district courts to fashion remedies for constitutional violations and raises important questions about the proper function of appellate courts in reviewing remedial orders.

In this case, the appellate court affirmed the district court's findings that state officials failed to fulfill their affirmative obligations to provide prisoners with minimally adequate shelter, sanitation, food, personal safety and medical care and its conclusion that the state has subjected prisoners to cruel and unusual punishment. (A. 13-15) The issue thus presented by the idleness, motility and classification principles is whether the district court exceeded its authority in including those provisions in its order to state officials to devise a plan for remedying the clear and undisputed constitutional violations, an order specifically designed by the district court to be less intrusive than other orders in similar cases.

The general principles governing resolution of this issue are well settled by prior decisions of this Court. *Hutto v. Finney,* 437 U.S. 678, 687 n. 9 (1978); *Milliken v. Bradley,* 433 U.S. 267, 280-81 (1977) (Milliken II); *Swann v. Charlotte-Mecklenberg Board of Education,* 402 U.S. 1, 15-16 (1971).

The appellate court gave lip service to this Court's ruling in *Hutto* that once an Eighth Amendment violation is found and the federal court's equitable powers are invoked, the trial court's power to remedy constitutional violations is broad. (A. 56) Nonetheless, the decision of the Court of Appeals vacating 3 of the trial court's remedial guidelines is directly contrary to this Court's rulings in *Hutto* and *Milliken II.* Devoting only two sentences to the issue, the Court of Appeals summarily vacated the District Court's remedial guidelines on idleness, motility, and classification on the grounds that "shortcomings in these areas are not of constitutional dimension." (A. 13) However, under *Hutto* and *Milliken II,* it is not necessary to show that every aspect of relief, if considered in isolation, is constitutionally required if the remedy is related to the eradication of the Eighth Amendment violations, gen-

erally helps to remove the conditions that are unconstitutional, and does not exceed the scope of the violation. *Hutto v. Finney,* 437 U.S. at 685-688; *Milliken II,* 433 U.S. 267; *Evans v. Buchman,* 582 F.2d 750, 769 (3rd Cir. 1978) (*en banc*) *cert. denied* 100 S.Ct. 1862 (1980); *Miller v. Carson,* 563 F.2d 741 (5th Cir. 1977); *Preston v. Thompson,* 589 F.2d 300, 303 (7th Cir. 1978); *Metro Housing v. Village of Arlington Heights,* 469 F.Supp. 836, 857 (1979) on remand from 429 U.S. 252 (1977); *Smith v. Sullivan,* 611 F.2d 1039, 1044 (5th Cir. 1980).

This kind of relief granted by the District Court in this case is similar to remedial orders in cases of similar magnitude[2] and should not have been disturbed by the Court of Appeals.

The Court of Appeal's *de novo* approach to remedy is directly contrary to the decisions of this Court which clear-

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[2]See, e.g., *Campbell v. McGruder,* 580 F.2d 521, 544-551, (D.C. Cir. 1978); *DiMarzo v. Cahill,* 575 F.2d 15, 18-20 (1st Cir. 1978) *cert. denied* 439 U.S. 880 (1978); *Rhem v. Malcolm,* 371 F.Supp. 594, 377 F. Supp. 995 (S.D. N.Y. 1974), *aff'd in part remanded in part* 507 F.2d 333, 338-339 (2d Cir. 1974) on remand 389 F. Supp. 964, 968 and 396 F. Supp. 1195, 1201 (S.D. N.Y. 1975); *Pugh v. Locke,* 406 F. Supp. 318, 331-35 (M.D. Ala. 1976) *aff'd in substance sub nom. Newman v. Alabama,* 559 F.2d 283 (5th Cir. 1977) *cert. denied in relevant part sub nom. Alabama v. Pugh,* 438 U.S. 791 (1978); *Gates v. Collier,* 349 F. Supp. 881, 898-905 (N.D. Miss. 1972), *aff'd,* 501 F.2d 1291 (5th Cir. 1974); *Jones v. Wittenberg,* 330 F. Supp. 707, 714-21 (N.D. Ohio 1971) *aff'd sub nom. Jones v. Metzger,* 456 F.2d 854 (6th Cir. 1972); *Preston v. Thompson,* 589 F.2d 300, 303-14 (7th Cir. 1978); *Palmigiano v. Garrahy,* 443 F. Supp. 956, 986-990 (D.R.I. 1977); *Laaman v. Helgemoe,* 437 F. Supp. 269, 328-330 (D.N.H. 1977); *Barnes v. Government of Virgin Islands,* 415 F. Supp. 1218, 1231-36 (D.V.I. 1976); see also *Welsch v. Likins,* 550 F.2d 1122 (8th Cir. 1977); *Wyatt v. Stickney,* 344 F. Supp. 373, 378-386 suppl. 344 F. Supp. 387, 394-407 (M.D. Ala. 1972), *aff'd in relevant part sub nom., Wyatt v. Aderholt,* 503 F.2d 1305 (5th Cir. 1974); *Martarella v. Kelley,* 359 F. Supp. 478, 483-486 (S.D. N.Y. 1973); *N.Y. Children Inc. v. Rockefeller,* 357 F. Supp. 752, 768-770 (E.D. N.Y. 1973).

ly leave the determination of the scope of a totality of conditions decree to the exercise of the district court's discretion. A reviewing court is not empowered to consider the propriety of relief *de novo* but must begin its analysis with *Milliken II. Evans v. Buchman,* 582 F.2d 750, 760, 767 (3rd Cir. 1978) (*en banc*) *cert. denied* 100 S. Ct. 1862 (1980). In reviewing the remedial guidelines which the trial court fashioned to address the areas of idleness, motility and classification, the appellate court failed to apply the 3 factors which this Court mandated the federal courts to observe in providing equitable remedies, *Milliken II,* 433 U.S. at 280, a mandate clearly followed by the trial court.

The first part of *Milliken II* requires a federal court to determine the nature and the scope of the violation and to insure that the remedy is related to conditions which offend the Constitution. Here, the trial court found that "idleness is responsible for more problems at Old Max than any other factor." (A. 84) Specifically, the trial court found that enforced idleness due to the lack of productive activity and the concomitant decision to confine most prisoners to their cells for prolonged periods of time had a direct impact on prisoners' health and safety, conditions which the appellate court agreed were of constitutional dimension:

- idleness and the lack of constructive activity are among the underlying causes of violence, (A. 88-9)
- the total lack of activity increases frustration and stress and causes mental and physical deterioration, (A. 86-7)
- idleness and prolonged daily confinement in cells without adequate activity is related to the maintenance of health. (A. 90-132)

Similarly, the trial court found that a valid classification system is essential for the protection of the constitutional right to safety and medical care. Here, the trial court did not find that prisoners had a constitutional right to "classification as such," but that the lack of a rational classification system was found to compromise the ability of officials to operate an orderly and safe prison and to provide for inmates' medical and psychological needs. The ineffectiveness of the classification system directly contributed to needless physical and mental suffering and deterioration. (A. 113, 136-7)

Where, as here, conditions of massive idleness and ineffectual classification combine to create a constitutional violation, the district court had the power and the duty to remedy the violation by issuing relief to address those conditions directly. Under these circumstances, the principles enunciated by the District Court addressing productive activity, motility and valid classification are appropriate remedial guideliness tailored to the nature and scope of the punitive conditions offending the Constitution.

The second requirement of *Milliken II* is that the decree be "remedial" in nature. The order is supported by the interdependence of the conditions producing the violation. Rampant violence and mental and physical suffering were attributable, in part, to unrelenting idleness, prolonged daily confinement in substandard and unsanitary cells, and ineffectual classification. Productive activity, motility (confinement in cells which meet minimally adequate standards or fewer hours of daily confinement in cells which clearly were "grossly inadequate"), and more rational classification assignments will help correct these conditions.

The last requirement of *Milliken II,* requires a federal

court to consider the interest of state officials in managing their affairs. However, as this Court reiterated in *Hutto*, once authorities *fail* in their affirmative obligations and the district court determines that it is necessary to invoke its equitable powers, the scope of the district court's remedial powers are broad.

In exercising its discretion to fashion a remedy, the district court chose to provide prison officials with the opportunity to put their house in order by presenting a plan that assures immediate attention to the most serious abuses found by the court to contribute to the punitive conditions – a practice uniformly considered the least intrusive method of gaining compliance. (A. 156-159) The primary responsibility for devising a suitable plan was and is with the State of Colorado.

The principles of productive activity and motility are tailored to eliminate the *unnecessarily* debilitating effects of confinement while providing "maximum latitude" to prison officials to run the state's institutions. (A. 158) All the experts, including the former Director of the Colorado Corrections Department, testified that productive activity was desperately needed to prevent massive idleness, rampant violence, and needless mental and physical deterioration. Moreover, there was uncontradicted testimony that no legitimate penological reason existed for continuing to subject prisoners to enforced idleness and unconstitutional living conditions.

The principle of productive activity is aimed at eliminating idleness but respects the interest of officials in managing their own affairs by leaving the selection of programs and the scheduling of activities to the discretion of prison officials. This principle places no limitations on respondents' ability to separate segments of the population for security reasons or to restrict certain prisoners to self-

improvement programs which may be accomplished in their cells.

The principle of motility is aimed at ameliorating unconstitutional conditions of confinement, but it gives prison officials the choice of eliminating unconstitutional living conditions directly or shortening the period of daily confinement in cells which the Court of Appeals agreed were "grossly inadequate." This principle does not limit prison officials' ability to confine certain prisoners to their cells for legitimate security reasons as long as officials house inmates in units which meet recognized standards for health and safety.

Similarly, the District Court's principle of classification presents little danger of interference with the prison administration. All the experts, including the former Director of the Department of Corrections, testified that classification is essential to the operation of an orderly, safe prison. The trial court's principle of coherence does not interfere with prison officials' ability to use a classification system of their own design and choosing.

The District Court's order and the inclusion of remedial guidelines on idleness, motility and classification is the least intrusive injunctive order that can remedy the constitutional violations, is long overdue, and should be reinstated.

(2) The Court of Appeals decision to vacate the trial court's order, except as to medical care, solely on the basis of non-record assertions as to "changed circumstances" presented by state officials for the first time at oral argument is contrary to the principles which this Court has established for remedying constitutional violations and the procedure which this Court has established for presenting newly discovered evidence.

The proper procedure for dealing with "changed circumstances" is for a party to move for relief from the judgment in the district court under Rule 60(b) of the Federal Rules of Civil Procedure. *Standard Oil of California v. United States,* 429 U.S. 17 (1976); *Goland v. CIA,* 607 F.2d 339, 370-373 (D.C. Cir. 1978) *cert. denied* 445 U.S. 927 (1980). Here the State of Colorado deliberately by-passed this procedure by presenting assertions as to "changed circumstances" directly to the Court of Appeals during oral argument. Since the appellate court has no fact finding functions, the proper procedure for an appellate court in this situation is to leave the district court order intact, to remand the case to give the district court an opportunity to pass on changed circumstances, and to let the district court decide whether to let the remedial order stand or be modified. In this case, instead of simply remanding the case, the Court of Appeals overstepped the bounds of a reviewing court by vacating the remedial order.

This is not a case where an exception should be made to the general rule that an order cannot be set aside on the basis of newly discovered facts outside the record. See *Goland v. CIA,* 607 F.2d at 370-373. Compare *Korn v. Franchard Corporation,* 456 F.2d 1206, 1208 (2d Cir. 1972). The District Court's order was consistent with the requirements of *Milliken II* and provided state officials an opportunity to present a plan which took into account "changed circumstances." Therefore, it cannot be said that the District Court's order was a clear abuse of discretion.

The Court of Appeals' decision to vacate the totality of conditions order on the basis of off-the-record assertions as to "changed conditions" undermines the role of the district court as the trier of fact and the shaper of equitable remedies. In prison condition cases, officials can

always attempt to avoid being subjected to the court's jurisdiction in the remedial stage of the proceedings by claiming that "conditions have changed." Hence the respective roles of the district court and the appellate court take on increased importance.

Certiorari should be granted in this case because the decision of the appellate court, if left standing, sets a dangerous precedent which could seriously erode the principles of equitable relief established in prior decisions of this Court. A firm statement is needed by this Court to reaffirm the power and the duty of district courts to act with deliberate speed in providing an effective remedy in prison cases where degrading conditions subject prisoners to cruel and unusual punishment and to clarify the duty of the appellate court to let the remedial order of the district court stand unless a clear abuse of discretion has been shown.

B. The Importance of the Issue

This case is important for the issues it raises as to the proper allocation of functions between the federal district courts and federal courts of appeals as well as the substantive issues on which it turns. This Court has consistently recognized that "the proper observance of the division of functions between federal trial courts and the federal appellate courts is important in every case" especially in cases where the district court has been asked to issue an effective remedy to cure unconstitutional conditions in public institutions. *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 410 (1971), *Milliken v. Bradley,* 433 U.S. 267 (1977) (public schools); *Hutto v. Finney,* 437 U.S. 678 (1978) (state prisons).

Certiorari should be granted because the Court of Appeals approach to remedial orders is contrary to the deci-

sions of this Court in *Hutto* and *Milliken II* and does not respect the role of the district court in fashioning remedial orders. The refusal of the Tenth Circuit to respect the findings of the district court and the action of the appellate court in reviewing the record *de novo* and making its own findings as to the propriety and scope of the remedy cannot be justified.

Here the District Court concluded that the totality of conditions which existed in 1979 constituted cruel and unusual punishment. That conclusion was reached reluctantly, and was based on many weeks of trial which, together with a personal inspection of the prison, gave the District Judge a unique knowledge of the facts, the nature and scope of the violation, the history of abuses, and the need for injunctive relief. Having found that petitioners were subjected to massive violations of their constitutional rights, the district court had the power and the duty to issue an injunctive order to provide an effective remedy to promptly cure the constitutional violations.

This case provides the proper vehicle for determining the respective roles of trial and appellate courts in determining appropriate remedial guidelines in totality of conditions cases. The issue is presented clearly in this case since the appellate court and the district court agreed that prison officials failed to fulfill their affirmative obligations to provide petitioners with basic food, shelter, sanitation, medical care and protection from violence and the district court's findings on the detrimental impact of the conditions of idleness and ineffectual classification on petitioners' health and safety were not disturbed by the appellate court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FIDEL RAMOS, DAVID LEE ANDERSON, SADIKI LISIMBA AJAMU (a/k/a Eugene Collins), ALEXANDER ROSES, MARK J. MENCHETTI and LESTER LAZENBY, *et al.*	)	
Plaintiffs-Appellees,	)	
v.	)	**No. 79-2324**
THE HONORABLE RICHARD D. LAMM, Governor of the State of Colorado; JAMES G. RICHETTS, Executive Director of the Dept. of Corrections; JOHN PERKO, Director of Div. of Adult Services of Colo. Dept. of Corrections; EDGAR FOX, Dir. of Div. of Correctional Industries of Col. Dept. of Corrections and WILLIAM WILSON, Supt. of Max. Sec. Unit (Warden)	)	**(D.C. No. 77-K-1093)**
Defendants-Appellants.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

J.D. McFarlane, Attorney General, and David K. Rees, Assistant Attorney General, Denver, Colorado (Richard

F. Hennessey, Deputy Attorney General; Mary J. Mullarkey, Solicitor General; Sarah Scott Sammons, Assistant Attorney General, Litigation Section; Tarquin Jay Bromley, Assistant Attorney General, Human Resources Section, Denver, Colorado, were on the brief) for Defendants-Appellants

James E. Hartley, of Holland & Hart, Denver, Colorado and Peggy A. Wiesenberg, National Prison Project, Washington, D.C. (Hugh Q. Gottschalk, Denver, Colorado and Ralph I. Knowles, Jr., National Prison Project, Washington, D.C., were on the brief) for Plaintiffs-Appellees

William C. Robb, Denver, Colorado (Philip G. Dufford of Welborn, Dufford, Cook & Brown, Denver, Colorado and Michael T. Risner, State Capitol, Denver, Colorado, were on the brief) for Amicus Curiae The General Assembly of the State of Colorado*

*The position of The General Assembly was supported by additional amici curiae, the Attorneys General of States of Alaska, American Samoa, Arizona, Delaware, Hawaii, Idaho, Indiana, Iowa, Kansas, N. Mexico, Ohio, Oklahoma, S. Dakota, Utah, Washington, Wyoming, Illinois, Michigan and Nebraska.

Before HOLLOWAY, BARRETT and LOGAN,
Circuit Judges

HOLLOWAY, Circuit Judge

The defendants-appellants, hereafter the State or the State of Colorado, appeal from an order of the United States District Court directing *inter alia* that the State of Colorado close the maximum security unit of the Colorado State Penitentiary at Canon City, Colorado, hereinafter referred to as "Old Max." The order was premised mainly on findings of numerous violations of the constitutional rights of the plaintiff class (inmates of the penitentiary) under the Eighth Amendment protecting against cruel and unusual punishment, with some additional constitutional infringements also being found. *Ramos* v. *Lamm,* 485 F.Supp. 122 (D. Colo.). Implementation of the order to close Old Max was deferred on the condition that the State would present proper plans for eradication of the constitutional violations found by the district court.[1] *Id.* at 169-70.

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[1]The State of Colorado, after filing a timely notice of appeal on December 28, sought a stay of the judgment from the district court, pending final resolution of this appeal. The district court, after a hearing, refused to grant the stay on February 21, 1980. VI R. 1293-C; *Ramos v. Lamm, supra,* 485 F.Supp. at 180. The State of Colorado then filed in this court a motion to stay enforcement of the judgment. On March 14, 1980 we granted the stay except with respect to the portion of the judgment and order which related to the health care of the inmates at Old Max. The stay order has been continued pending disposition of this accelerated appeal on the merits.

I

The Factual Background

In November 1977 Fidel Ramos, an inmate at Old Max, filed a *pro se* civil rights suit under 42 U.S.C. § 1983 against certain State defendants challenging as unconstitutional his status as a "transitional worker" at Old Max and his living conditions at that facility. In february 1978 the National Prison Project and the A.C.L.U. Foundation of Colorado appeared on behalf of Ramos and filed an amended complaint, styled as a class action, basically alleging that "the totality of the conditions' at Old Max violated various constitutional rights of the inmates confined in that facility. The amended complaint did not seek compensatory or punitive damages as did the original *pro se* complaint; rather it asked only for declaratory and injunctive relief along with costs, expenses, and attorneys' fees. The district court certified the suit as a class action under Rule 23(a), F.R. Civ. P. and described the class as "[a]ll persons who are now or in the future may be incarcerated in the maximum security unit of the Colorado State Penitentiary at Canon City, Colorado." I.R. 62[2]

After extensive discovery trial began on October 15, 1979, Following five (5) weeks of trial, the district court on November 15 ruled from the bench in favor of the plaintiff class and entered certain emergency orders pertaining to medical care. On December 20 the court filed a memorandum opinion and order supplementing the bench ruling

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[2]The class definition was later amended at trial to include: "All persons who now or in the future may be incarcerated in the maximum security unit, or the new maximum or close security unit, of the Colorado Department of Corrections." *See* VI R. 1165, 1274; XL R. 128-29.

and detailing its findings of violations of the plaintiffs' rights. *Ramos* v. *Lam, supra.*[3]

On this appeal the State of Colorado argues that the trial court erred: (1) in refusing to abstain from exercising its jurisdiction in this case; (2) in failing to "apply the correct constitutional standard in making its findings that the totality of conditions at . . . [Old. Max] violated the plaintiff class' eighth amendment rights;" (3) in finding a constitutional violation because the evidence, measured under the correct constitutional standard, was insufficient to support such findings; and (4) in choosing an appropriate remedy. We will detail additional facts as we discuss the appellate contentions, to which we now turn.

II

Abstention

Subsequent to the filing of the amended complaint the State filed a "motion to dismiss and/or abstain." After a hearing the district court denied the motion to abstain without prejudice to the issue being raised at a later time. During closing arguments, counsel for the State again asked the district court to abstain from exercising its jurisdiction.

In its written opinion the court concluded that although it had shown "great deference" to Colorado prison officials in the past, it was unable to continue that deference

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[3]A final judgment under Rule 54(b), Fed. R. Civ. P., was entered on the claim for injunctive relief. *See Ramos v. Lamm, supra,* 485 F. Supp. at 170. No final judgment was rendered on the claims for attorneys' fees and costs and therefore those claims are not before us now.

in light of the "substantial, often compelling, evidence of long existing and continuing constitutional violations." 485 F.Supp. at 132. Accordingly, the district court declined to abstain.

The State first strenuously argues for reversal under the principles enunciated in such cases as *Colorado River Water Cons. Dist.* v. *United States,* 424 U.S. 800; *Younger* v. *Harris,* 401 U.S. 37; *Burford* v. *Sun Oil Co.,* 319 U.S. 315; *Railroad Comm'n* v. *Pullman Co.,* 312 U.S. 496. The state claims that there were several pending state proceedings in which the conditions of confinement at Old Max were being challenged, that the plaintiffs could have intervened as a matter of right in at least one of these proceedings under Colo. R. Civ. P. 24, and that the plaintiffs could have instituted a § 1983 civil rights action in a Colorado state court. Thus abstention was mandated since the plaintiff class had an "opportunity" to present their federal claims in a state forum.

The State further claims that the principle of comity and the critical state interest in the operation of its penal system make federal court abstention "particularly important where the plaintiff challenges the constitutionality of the state's prison system"; that "the state's efforts to establish a coherent policy with respect to a matter of substantial public concern" were disrupted by the district court's refusal to abstain; and that since questions of state law are critical to the resolution of the case, the district court should have abstained. *See* Brief of Appellant at 15-25.

We are acutely aware of the delicate role of the federal courts in matters involving the administration , control, and maintenance by the states of their penal systems – an area historically within the domain and control of those

sovereign entities. *See Battle* v. *Anderson,* 564 F.2d 388, 391-92 (10th Cir.); *Bethea* v. *Crouse,* 417 F.2d 504, 505-06 (10th Cir.); *see also Procunier* v. *Martinez,* 416 U.S. 396, 404-05; *Preiser* v. *Rodriguez,* 411 U.S. 475, 491-92. We cannot agree, however, with the State's argument here that the district court abused its discretion[3] in refusing to abstain in view of the serious violations alleged of basic rights under the First, Eighth, and Fourteenth Amendments, and the substantial evidence later offered on these claims. *See, e.g., Campbell* v. *McGruder,* 580 F.2d 521, 527 (D.C. Cir.) *and see Bell* v. *Wolfish,* 441 U.S. 520, 562. "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Colorado River Water Cons. Dist.* v. *United States, supra,* 424 U.S. at 813. Only in "exceptional circumstances" should a federal plaintiff be ordered to repair to the state court. *Id.; accord, Zwicker* v. *Koota,* 389 U.S. 241, 248 (abstention appropriate "only in narrowly limited special circumstances").

In reviewing the district court's refusal to abstain, we note that the Supreme Court has "confined the circumstances appropriate for abstention to three general categories," none of which apply to justify refusal to hear this constitutional case. *Colorado Riover, supra,* 424 U.S. at 1814; *see generally* 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §§ 4241-55 (1978). This is not a case where the federal constitutional

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[4]The decision to abstain is largely committed to the discretion of the district court. *See e.g., Will v. Calvert Fire Ins. Co.,* 437 U.S. 655, 663-66 (1978) (plurality); *Baggett v. Bullitt,* 377 U.S. 360, 375; *George v. Parratt,* 602 F.2d 818, 819 (8th Cir.).

issues "might be mooted or presented in a different posture by a state court determination of pertinent state law." *Colorado River Water Cons. Dist.* v. *United States, supra,* 424 U.S. at 814; *Railroad Comm'n* v. *Pullman Co., supra,* 312 U.S. at 500-01; *see Manney* v. *Cabell* ____ F.2d ____ (9th Cir. No. 79-3260, April 29, 1980). The *Manney* case does apply the abstention doctrine in the setting of a correctional institution controversy, but it does so in a case where the application of two state statutes might avoid the federal constitutional issues. Here there are no underlying issues of state law which, if resolved, might avoid the decision of this case as a whole and its substantial constitutional claims, most of which we uphold.[5] The rights claimed to have been violated are plainly federal in origin and nature and are in no way "entangled in a skein of state law that must be untangled before the federal case can proceed." *McNeese* v. *Board of Educ.,* 373 U.S. 668, 674. The mere fact that a federal claim, brought in federal court, might have been brought instead in state court does not justify abstention. *See, e.g., Zablocki* v. *Redhail, supra,* 434 U.S. at 379-80 n.5; *Colorado River, supra,* 424 U.S. at 813-14; *Zwickler* v. *Koota, supra,* 389 U.S. at 1251.

Likewise, this is not a case which presents "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case . . at bar." *Colorado River, supra,*

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[5]It is true, as the State points out, that the district court did discuss and interpret several state statutes. *See* 485 F.Supp. at 139, 146, 157, 159-60, 167 n. 44. However, resolution of these state law questions does not mandate the conclusion that the district court should have abstained from deciding this case which is primarily concerned with federal constitutional law. *See Hagans v. Lavine,* 415 U.S. 528, 545-46.

424 U.S. at 1814. In *Burford* v. *Sun Oil Co., supra* 319 U.S. 315, the Supreme Court held that the district court should dismiss a complaint on the ground that the issues involved a specialized aspect of a complicated local regulatory system which, the court concluded, should be left to local administrative bodies and courts. *See also Alabama Public Service Comm'n* v. *Southern R. Co.,* 341 U.S. 341, 349. Here local state courts have not been assigned a special review function over the administration and maintenance of Old Max. There is no state adjudicative system charged with the implementation of state policy as in *Colorado River.* Thus the exercise of federal jurisdiction in this case will not cause a widespread disruption of a unified scheme of local regulation. *See, e.g., Campbell* v. *McGruder, supra,* 580 F.2d at 525; *Santiago* v. *City of Philadelphia,* 435 F.Supp. 136, 145 (E.D. Pa. 1977); *see generally Procunier* v. *Martinez, supra,* 416 U.S. at 405-06; *Preiser* v. *Rodriguez, supra,* 411 U.S. at 499 & n.14. The fact that a federal constitutional challenge is made against state penal administration "does not establish that the controversy is an unduly sensitive one beyond legitimate federal concerns." *McRedmond* v. *Wilson,* 533 F.2d 757, 764 (2d Cir.).

Finally, this is not a case in which the plaintiffs have attempted to enjoin a pending state proceeding initiated by the state against them in which they would have an opportunity to present their federal claim in a state forum. *See Younger* v. *Harris,* 401 U.S. 37 (1971); *see also Moore* v. *Sims,* 442 U.S. 415, 423-25. Here there is no pending state proceeding initiated by the state. There are only pending actions in the state court with a number of similar issues, in which the plaintiff class might have intervened. "Generally, as between state and federal courts, the rule is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal

court having jurisdiction . . . .'" *Colorado River, supra,* 424 U.S. at 817; *accord, Will* v. *Calvert Fire Ins. Co., supra,* 437 U.S. at 662 (plurality) and 670 (Brennan, J., dissenting). Consequently, the district court correctly determined that abstention under the *Younger* line of cases was inappropriate. *See Ramos* v. *Lamm, supra,* 485 F.Supp. at 174.

In sum, we conclude there was no error or abuse of discretion by the district court in declining to abstain from hearing this constitutional case and the substantial constitutional claims asserted. As the Supreme Court noted in *Procunier* v. *Martinez, supra,* 416 U.S. at 405-06:

> [A] policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts, will discharge their duty to protect constitutional rights.[6]

Like the trial judge, we are moved by the words of Judge Murrah from *Stapleton* v. *Mitchell,* 60 F.Supp. 51, 55 (D. Kan.), words recalled by the Supreme Court in *Zwickler* v. *Koota, supra,* 389 U.S. at 248, in describing the duty of federal courts "to guard, enforce, and protect *every* right granted or secured by the Constitution of the United States":

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[6]Appellant argues that *Procunier* is distinguishable because in that prison case "there was no parallel state proceeding and . . . [it] was strictly a first-amendment case." Reply Brief of Appellant at 4. We cannot agree that the Supreme Court's reasoning logically applies only to First Amendment claims. And for reasons already noted we do not feel that the pending state proceedings justified abstention from hearing this case.

> We yet like to believe that whenever the Federal Courts sit, human rights, under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.

III

The Eighth Amendment Claims

In a bifurcated argument the State, supported by the Colorado General Assembly as amicus, challenges the district court's ultimate finding that the constitutional rights of the plaintiff class have been violated as a result of the conditions of confinement at Old Max. Their general line of argument is that (1) the trial court failed to use the correct constitutional standard in assessing the Eighth Amendment claims, and (2) the evidence, measured by the correct standard, "is insufficient to support the trial court's finding that the conditions of confinement . . . constitute cruel and unusual punishment." See Brief of Appellant at 25, 34; Brief of Amicus Curiae at 13-14.

We will consider the constitutional standard to be applied to the Eighth Amendment claims first. Then we will analyze the more specific challenges to the trial court's findings leading to its conclusion that the State has violated the constitutional guarantee.

A. The Constitutional Standard

In *Battle* v. *Anderson, supra,* 564 F.2d at 393, we stated that "the Supreme Court has not wavered in its holding that the Eighth Amendment . . . is, *inter alia,* intended to

protect and safeguard a prison inmate from an environment where degeneration is probable and self-improvement unlikely because of the conditions existing which inflict needless suffering, whether physical or mental." In affirming the district court's finding there that overcrowding in the Oklahoma State Penitentiary violated the inmates' Eighth Amendment rights, we held "that while an inmate does not have a federal constitutional right to rehabilitation, he is entitled to be confined in an environment which does not result in his degeneration or which threatens his mental and physical well being." *Id.* at 401, 403.

The district court and the plaintiffs rely to some degree on this language from *Battle* to support the conclusion that a constitutional violation occurred here.[7] *See* 485 F.Supp. at 133, 156; Brief of Appellee at 43, 101. The State and the amicus say that it was error to apply the "degeneration standard" from *Battle,* error which taints the finding that the totality of conditions at Old Max violate the Eighth Amendment. They urge that we adopt instead the standard enunciated in *Newman* v. *Alabama,* 559 F.2d 283, 291 (5th Cir.), *cert. denied,* 438 U.S. 915:

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[7]The district judge did not rely solely upon the quoted language from *Battle* in finding that the inmates' constitutional rights had been violated. He also stated (485 F.Supp. at 153-54 n.20):

> I find that *the conditions of confinement* at . . . [Old Max] *meet all tests by all known measures of proof.* As shown by substantial evidence, these conditions, shock the conscience, are incompatible with evolving standards of decency, involve unnecessary and wanton infliction of pain, and evidence both deliberate indifference to the prisoners' protected interests and "circumstances and conduct so grossly incompetent, inadequate or excessive as . . . to be intolerable to basic fairness." (Emphasis added).

See also Brief of Appellees at 37-38.

> If the State furnishes its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety so as to avoid the imposition of cruel and unusual punishment, that ends its obligation under Amendment Eight.

See Brief of Appellant at 27-33; Reply Brief of Appellant at 6, 9-11; Brief of Amicus Curiae at 8-9, 11-14.

We see no conflict between our decision in *Battle* and the Fifth Circuit's decision in *Newman*. The standard announced in *Battle* concerned degeneration in relation to the entire penal environment – the conditions of confinement. These conditions were not identified in *Battle* beyond inadequate cell space. We conclude that in the areas of shelter, sanitation, food, personal safety, and medical care – the core areas in any Eighth Amendment claim[8] the district court's findings and conclusions of violations of the plaintiffs' rights are entirely justified and supported by the record. We do not think, however, that the record in this case requires or justifies going into all of the concepts on penology pressed by the plaintiffs and adopted in the district court's opinion – the concepts of motility, classification, and idleness – since the shortcomings in these areas are not of constitutional dimension. While there may be a point where abuse in these areas would constitute an actual violation of the Eighth Amendment guarantee, we hold that in this case the present record and the findings on these subjects do not warrant the court's broad remedial orders (485 F.Supp. at 170) intruding into these areas of prison administration. *See Battle* v. *Anderson, supra,* 564 F.2d at 403; *Newman* v. *Alabama, supra,* 559 F.2d at 291-92; *Marchesani* v. *Mc-*

[8]We would agree that adequate clothing is also a core area of consideration in an Eighth Amendment claim. However, because it is not an issue in this case, we need not discuss it.

Cune, 531 F.2d 459, 462 (10th Cir.), *cert. denied,* 429 U.S. 846.

Thus we conclude that the district court did not apply an improper constitutional standard here in making its findings on shelter, sanitation, food, personal safety, and medical care at the Colorado prison.

B. The Sufficiency of the Evidence to Support the Findings of Eighth Amendment Violations

With a few exceptions, the State generally admits that there was "little conflict in the evidence which was introduced at trial." Instead its argument is "directd towards what it feels was a clearly erroneous assimilation of those facts" by the district court. Brief of Appellant at 25-26, 37. Thus it appears the State is mainly arguing that the undisputed evidence does not support the court's ultimate finding and conclusion that the conditions of confinement at Old Max violate the Eighth Amendment rights of the inmates. *See generally* XLV R. 106-07.

After extensive hearings and a personal inspection of the prison, the district court made detailed findings of fact in the core areas which we have mentioned. Such findings by the trial judge who heard and saw the evidence may not be set aside on appeal unless they are clearly erroneous. *See e.g., Rasmussen Drilling Inc.* v. *Kerr-McGee Nuclear Corp.,* 571 F.2d 1144, 1148-49 (10th Cir.), *cert. denied,* 439 U.S. 862 (1978); *Battle* v. *Anderson, supra,* 564 F.2d at 400; F.R. Civ. P. 52(a)[9] The resolution

[9]In applying Rule 52 the Supreme Court has said that

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

United States v. United States Gymsum Co., 333 U.S. 364, 395.

of conflicts in the evidence and the appraisal of credibility of witnesses are for the trial court hearing a case without a jury. *See Rasmussen Drilling, Inc.* v. *Kerr-McGee Nuclear Corp., supra,* 571 F.2d at 1149. Guided by these principles we will consider the findings in detail.

1. Shelter and Sanitation

The district court made a general finding that the inmates of Old Max "are housed under conditions which fall below all recognized constitutional and professional standards."[10] 485 F.Supp. at 133. Specifically it found *inter alia* that "[t]he main living areas of Old Max are unfit for human habitation; that most of the cells in which inmates are confined provide for barely one-half the square footage of space required by modern correctional standards; and that "[e]nvironmentally Old Max is inadequate to meet the health and safety needs of prisoners in the correctional system." *Id.* at 134. With respect to the "physical environment," the court found that the "conditions are grossly inadequate and constitutionally impermissible." *Id.* at 155.

The State argues that much of the court's criticism of Old Max is directed at the prison's design, which it admits

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[10]The appellants point out that professional standards "establish goals and simply do not establish constitutional minima." Reply Brief of Appellant at 11, quoting *Bell v. Wolfish,* 441 U.S. 520, 544. While we agree that a variance from state standards or from standards promulgated by certain professional organizations does not establish a *per se* constitutional violation, it is a factor to be considered in determining whether contemporary standards of decency have been met. *See, e.g., Estelle v. Gamble,* 429 U.S. 97, 103-04 & n. 8; *Smith v. Sullivan,* 611 F.2d 1039, 1045 (5th Cir.); *Burks v. Walsh,* 461 F. Supp. 454, 483 (W. D. Mo.); *Palmigiano v. Garrahy,* 443 F. Supp. 956, 961 n. 2, 979-80 n. 30 (D.R.I.); *See generally Battle v. Anderson, supra,* 564 F.2d at 395.

"is a vestige of the past and is not consistent with modern penology." Brief of Appellant at 48. The "salient point" according to the State "is that long before this suit was filed, the state had begun to build a "state of the art' prison which will not have the deficiencies of the present Auburn prisons." *Id.* It argues that since the designing of Auburn style prisons was a stopped in the late 1960's, and the constitutionality of using certain cells at Old Max was upheld by this court in 1975, "its beginning to plan a new prison in 1976 is overwhelming evidence that it is keeping pace with evolving standards of decency that mark a maturing society."[11] *Id.* at 50. The State also says that since "the length of confinement must be considered" in determining whether constitutional standards have been violated, the trial court's failure constitutes reversible error. *Id.* Finally, with respect to sanitation, the State argues that "the totality of circumstances in sanitation cannot be held to be unconstitutional" because the evidence clearly shows that sanitation "has improved greatly over the last few years"; that cleaning activity has increased significantly under the directorship of defendant Ricketts; and that many of the sanitation problems at Old Max are a direct result of the inmates' absolute refusal to help keep the prison clean. *Id.* at 56-57.

In response, plaintiffs argue that "the undisputed findings establish that the physical conditions of confinement at Old Max are 'grossly inadequate'"; that the construction of new prison facilities which will be completed in the future is not a defense to present unconstitutional condi-

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[11] Although construction of a new prison should be considered in devising an appropriate remedy, *see* Part VII, *infra*, we must agree with the district court that it is not a defense to demonstrated present constitutional violations. *See 485 F. Supp. at 167-68; see also Battle v. Anderson, supra,* 564 F.2d at 403.

tions of confinement; and that there is no record evidence which supports the State's claim that Old Max will be closed voluntarily or permanently. Answer Brief of Appellees at 46-49, 55-59.

In *Battle* v. *Anderson, supra,* we upheld the district court's conclusion that "[i]t is incumbent on the incarcerating body to provide the individual with a healthy habilitative environment." 564 F.2d at 395. In affirming in *Battle,* we upheld the finding that 60 square feet of living space was the minimum amount of square footage which the Eighth and Fourteenth Amendments require that a state provide an inmate. *Id.* at 395, 397, 403. A necessary corollary to this ruling is that a state must provide within such living space reasonably adequate ventilation, sanitation, bedding, hygienic materials, and utilities (*i.e.,* hot and cold water, light, heat, plumbing). *Id.* at 394-95, 403; *see also Bono* v. *Saxbe,* 620 F.2d 609, 613 (7th Cir.); *Hite* v. *Leeke,* 564 F.2d 670, 674 (4th Cir.); *Palmigiano* v. *Garrahy, supra,* 443 F.Supp. at 979; *Laaman* v. *Helgemoe,* 437 F.Supp. 269, 308-09, 323 (D.N.H.). In short, a state must provide an inmate with shelter which does not cause his degeneration or threaten his mental and physical well being. *Battle* v. *Anderson, supra,* 564 F.2d at 403.

Considering the record in light of this standard, the evidence showed these facts. Old Max came into existence as a territorial prison in the late 1860's before Colorado became a state. The physical facility as it exists now "dates from 1895, with numerous additions, the most recent in 1971." II App. Exh. 26; I App. Tes. 15-17. Approximately 1000 inmates are housed in five cellhouses within the walls of the institution and one cellhouse outside the prison walls. I App. Tes. 116-17; IV App. Tes. 114; Brief of Appellant at 39.

Most of the prison population is housed in three cellhouses — 1, 3 and 7. Cellhouse 1, built in 1948, contains approximately 360 inmates who are assigned single cells which are 35 square feet in size, with net usable space of about 14 square feet. I App. Tes. 43-44; II App. Exh. 97; V.R. 849. Cellhouse 3, built in 1951, contains approximately 86 prisoners in protective custody, administrative segregation, punitive segregation, or deathrow. Inmates in cellhouse 3 are not considered members of the general prison population since they are locked in their cells an average of 23 hours a day. I App. Tes. 19. These cells do not provide the inmate the 60 square feet of space required in *Battle*.[12] Cellhouse 7 was built in 1938 and is structurally similar to cellhouse 1.[13] It houses approximately 390 inmates who are either in protective custody or administrative segregation, or who are classified as transitional workers (*i.e.* inmates without jobs). Cellhouse 7 has 325 cells of 31.5 square feet and 64 cells, used for administrative segregation, of approximately 62 square feet. I App. Tes. 30; II App. Exh. 165-66; V.R. 862; XXIII R 11; XXIX R. 50.

The remainder of the prison population is housed in cellhouses 4 and 5 and the Diagnostic Unit. Cellhouse 4,

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[12]Appellants admit "that most of the cells in cellhouses 1 and 7 do not provide the sixty square feet per inmate required by *Battle* . . ." Brief of Appellant at 52. There is some indication in the record that the cells in cellhouse 3 are smaller than those in cellhouses 1 and 7. *See* I App. Tes. 392-93. However the record, the appellate briefs, and the district court's opinion do not reveal the exact size of the cells in cellhouse 3. However, the district court did find that these cells in cellhouse 3 failed to meet the *Battle* standard, *see* 485 F.Supp. at 134, and the defendants do not contest this finding.

[13]In 1975, cellhouse 7 was closed and plans were made to tear it down. However, after the prison riot in May 1975, it was reopened to relieve the overcrowded condition of cellhouse 1. Brief of Appellant at 41; I App. Tes. 31; 485 F.Supp. at 134.

built in the 1930's, is located outside the prison walls and once was used as the women's prison. The cells are about 40 square feet. I App. Tes. 17, 44-45. Cellhouse 5 is located under the prison infirmary and houses about 20 trustee inmates.[14] *Id.* at 17. The Diagnostic Unit cellhouse is a three-tier unit which was built in 1962 and currently houses 120 inmates. The cells in this unit are approximately 49 square feet. I App. Tes. 45-46, 369; III App. Tes. 110. Thus we note that there is a widespread deficiency in living space under the *Battle* standard.

Aside from the deficiency in cell size, the buildings where inmates live are in a serious state of disrepair and fail to meet minimal health and safety needs of the prisoners. For example, the roofs in the major cellhouses and the prison auditorium leak, despite repair work. *See* I App. Tes. 27, 392, 395, 398; III App. Tes. 131-32; II App. Exh. 130-32, 144-45. Existing heating and ventilation systems are incapable of providing adequate temperature control and ventilation in the cellhouses and in some work buildings used by the inmates. *See* III App. Tes. 102-03, 128-46; 189, 191; II App. Exh. 130-32, 143-50, 158, 162-66, 196-97, 200.

Inadequate ventilation, especially in the cells and shower areas, results in excessive odors, heat, and humidity with the effect of creating stagnant air as well as excessive mold and fungus growth, thereby facilitating personal discomfort along with health and sanitation problems. *See* II App. Exh. 158, 162-67. Leaking pipes and defective plumbing cause sewage to accumulate in cells and service areas or to drain into adjacent or lower cells,

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[14]The record does not reflect the size of the cells in cellhouse 5. Appellant claims that cellhouse 5 houses approximately 40 prisoners who live "in cubicles, not cells, which surround a central common area." Brief of Appellant at 40.

resulting in innumerable health and safety problems which, when combined with the temperature control and ventilation problems, make the main living areas particularly unfit for human habitation. *See* I App. Tes. 29, 42, 44, 85; II App. Exh. 11-13, 26, 131-51; III App. Tes. 131-47, 215; IV App. Tes. 116-17; XXXIII LR. 83-85, 106.

In addition, the evidence also shows an extensive problem with rodent and insect infestation in the cellhouses. *See* I App. Tes. 27, 191-92; II App. Exh. 145, 147, 163; III App. Tes. 109-10, 128-46, 195-96. Trash, decayed food, and other material routinely litter the cells and corridors of the cellhouses, conditions which are partially the product of the inmates' own actions. *See,* I App. Tes. 27-28, 196; II App. Exh. 131-45, 162, 167; III App. Tes. 137-38. Nevertheless, many of the health and sanitation deficiencies, were found to be "the result of a lack of routine maintenance and cleaning programs." 485 F.Supp. at 136. Bath water in the shower areas remains impounded on the floors due to obstructed drains. Missing ceramic floor tiles make shower room floors exceptionally difficult to clean and provide areas for significant mold and slime buildup. Metal stubs sticking up through the floor along with exposed electrical wiring provide additional health hazards to inmates using the shower facilities. *See* I App. Tes. 203; II App. Exh. 130-32, 144, 148-52; III App. Tes. 107-09, 125-26, 143, 147, 195. These deficiencies could be corrected by routine maintenance and cleaning programs. *See* II App. Exh. 130-32, 162-68.

The health and sanitation problems extend beyond the common-use areas and into the individual cells. The evidence shows that in some instances inmates are not provided with enough cleaning supplies to allow them to adequately clean their own cells. *See* I App. Tes. 197; III App.

Tes. 18, 125-27, 197. Numerous broken windows and the lack of window screens contribute significantly to the fly infestation problem. *See id.* at 128. The bedding used by inmates is heavily stained and soiled, and is not cleaned or changed when a new inmate is assigned to a cell. *See id.* at 105-07, 131, 139; II App. Exh. 144, 152; I App. Tes. 196. These items could also be corrected by routine maintenance and cleaning programs. *See* II App. Exh. 162-68.

Without doubt, the State's inability to meet minimal shelter and sanitation standards contributes immeasurably in making the main living areas unfit for human habitation. III App. Tes. 215. Unquestionably, the small cells in which inmates are confined, along with the deteriorating and unsanitary conditions in the main living areas, have a direct detrimental impact on the health and well being of the inmates. Considering the record as a whole we must sustain the trial court's findings and conclusion that the conditions in which inmates are confined at Old Max are "grossly inadequate and constitutionally impermissible."

2. Food

The district court found that the "[c]onditions in the food services areas . . . fail to meet any known public health standards;" the kitchen facilities and equipment are obsolete and unsanitary; state health code violations persist, after numerous inspections; most of the deficiencies are "caused by a lack of routine maintenance, operational and cleaning procedures"; these deficiencies "have long been serious problems"; and the "unsanitary conditions have a direct impact on the health of the inmate population." 485 F.Supp. at 136, 155. The court concluded that

these "conditions are grossly inadequate and constitutionally impermissible. "*Id.* at 155.[15]

The State recognizes that the court's findings concerning the sanitation in the kitchen areas are "extremely serious." However, it argues that the court "pieced together various facts and failed to accurately reflect the totality of conditions" at Old Max. Brief of Appellant at 53-54. Moreover, because this is "the one area in which the defendant's evidence significantly conflicted with the plaintiff's evidence," the State complains that the court failed to note favorable testimony from a defense witness concerning the kitchen facility, despite the court's conclusion that all state witnesses were credible. *Id.* 52, 54. Finally, although it does not deny the health code violations, the State objects to the district court's use of state health department standards in determining whether the conditions in the food service area violate constitutional standards. *Id.* at 55-56.

As we noted earlier, the State must provide an inmate with a "healthy habilitative environment." This includes providing nutritionally adequate food that is prepared and served under conditions which do not present an immediate danger to the health and well being of the inmates who consume it. *See, e.g., Palmigiano* v. *Garrahy, supra,* 443 F.Supp. at 962, 979; *Laaman* v. *Helgemoe, supra,* 437 F.Supp. at 309, 323; *Pugh* v. *Locke,* 406 F.Supp. 318, 329 (M.D. Ala), *aff'd as modified sub nom., Newman* v. *Alabama,* 559 F.2d 293, 288 (5th Cir.), *rev'd in part sub nom., Alabama* v. *Pugh,* 438 U.S. 781, *cert. denied, Newman* v. *Alabama,* 438 U.S. 915; *see also Campbell* v.

[15]There is no claim here that the food being served to the inmates is nutritionally inadequate.

McGruder, supra, 580 F2d at 548, *Sweet* v. *South Carolina Dept. of Corrections,* 529 F.2d 854, 862 (4th Cir.). Moreover the state health code, while not establishing "constitutional minima," is relevant in making a finding regarding the constitutionality of existing conditions. *See* note 10 *supra; see also Williams* v. *Edwards,* 547 F.2d 1206, 1214 (5th Cir.).

Here conditions in the main food service areas are substantially similar to the unsanitary conditions which exist in the main living areas. The physical plant itself is old, outdated,and poorly maintained. Kitchen equipment is in a state of disrepair. The dishwasher in the main kitchen leaks water all over the floor, creating a safety hazard for those working in the kitchen area. Floor drains barely function and standing pools of water are common. Rotting food remains on floors which are not readily cleanable due to their deteriorated condition. Ventilation throughout the main kitchen is inadequate and high temperatures are common.

In addition, sanitation deficiencies are compounded by a highly irregular and ineffective cleaning program. The floors, walls, windows, and food storage shelves throughout the food service area are soiled with dirt and rodent droppings. The walls of the walk-in coolers where food is stored have mold growing on them. Floor fans used to circulate the air cause dust and lint to be blown over the food preparation and dishwashing areas. Rodent and insect infestation is extensive.

Inmate workers are not given basic instruction on food protection and food service sanitation.[16] Consequently

[16]III App. Tes. 119.

food items are stored on the floors of walk-in storage compartments and food is often left uncovered allowing the rodents and roaches to contaminate it. Food products which can support food borne diseases are not properly stored and are often left out at room temperature. Food preparation surfaces and cooking equipment are not properly cleaned and therefore provide areas for significant bacterial growth. Food, when it is being served to inmates, is kept at substandard temperatures due to the improper use of the available equipment. *See* III App. Tes. 98-102, 110-125, 209; II App. Exh. 283-88.

After inspecting such conditions the Colorado Department of Health itself found that "[s]ubstantial deficiencies exist in the food service facilities" at Old Max. As of July 17, 1979, that state agency refused to issue a Certificate of Inspection for the food service facilities since they were not "in substantial compliance with the 'Rules and Regulations Governing the Sanitation of Food Service Establishments in the State of Colorado.'" II App. Exh. 255, 291. It was the conclusion of Mr. Gordon, an expert in the field of environmental health, sanitation, and safety,[17] that *"the food service [at Old Max] represents imminent danger to the health and well-being of the inmates consuming food in that operation."* XXIX R. 35 (emphasis added); *see also* III App. Tes. at 94, 199-200, 205-06, 216.

Considering all the evidence, we conclude that the record amply supports the district court's findings and

[17]In the District of Columbia, Mr. Gordon was serving by appointment of the Mayor as Program Manager for a special task force on inspection of city-wide, community-based residential facilities. Previously he was Chief of the Institutional Hygiene Division of the District of Columbia Environmental Health Administration. XXIX R. 2-3.

conclusions that the conditions in the food service areas at Old Max are unsanitary and have a substantial and immediate detrimental impact upon the health of the inmate population. We must uphold the court's findings and conclusion that the conditions in the food services areas at Old Max "are grossly inadequate and constitutionally impermissible."

3. **Personal safety**

The district court found that the inmates and correctional staff at Old Max have lived in an atmosphere of tension, anxiety and fear, resulting in an unsafe environment for both; that the institution "is still fraught with tension and violence"; and that "[t]he design and staffing of all the major housing units contribute immeasurably to violence between inmates, often leading to severe injury and death." 485 F. Supp. at 140-42. It also found that the conditions of confinement, one of which was the lack of physical safety for inmates, "evidenced . . . deliberate indifference to the prisoners' protected interests." *Id.* at 153-54 N.20. The court concluded that the lack of safety deprived prisoners of their constitutional right to be reasonably protected from constant threats of violence and sexual assault from other inmates. *Id.* at 155-56.

The State claims that the district court has distorted the facts and has "patched together various portions of the record under the guise of making a finding of the totality of conditions" at Old Max; that it "has failed to distinguish between the prison's *history* of violence and the conditions which existed in October 1979"; that the level of violence at Old Max has been "significantly reduced" in recent years; that the reference to suicides and self-mutilatory gestures is improper since a state has no duty to

keep an inmate from hurting himself; and that reliance upon the number of inmates in protective custody to show that fear and violence exists at Old Max is misplaced since Old Max houses protective custody cases from other prisons in the state system. Brief of Appellant at 57-64. The State further says that the current staffing levels at Old Max are based on the needs of the new prison which is currently being built and that the district court's finding that inadequate staffing at Old Max contributes to inmate violence is inconsistent with its finding that the prison's physical design makes it impossible to provide adequate security. *Id.* at 58. Finally, the State argues that the district court has misconstrued the law concerning a prisoner's right to safety and that the plaintiff class has failed to show that the State has acted with deliberate indifference toward their safety. *Id.* at 62-64.

As we noted in *Marchesani* v. *McCune,* 531 F.2d 459, 462 (10th Cir.), *cert. denied,* 429 U.S. 846, a "[p]rison setting is, at best, tense. It is sometimes explosive, and always potentially dangerous." Nevertheless, as the State concedes, an inmate does have a right to be reasonably protected from constant threats of violence and sexual assaults from other inmates. Brief of Appellant at 62. *See Clappier* v. *Flynn,* 605 F.2d 519 (10th Cir.); *Hite* v. *Leeke,* 564 F.2d 670, 673 (4th Cir.); *Finney* v. *Arkansas Bd. of Correction,* 505 F.2d 194, 201 (8th Cir.). Moreover, he does not need to wait until he is actually assaulted before obtaining relief. *See Woodhous* v. *Virginia,* 487 F.2d 889, 890 (4th Cir.).

Here the evidence shows that in recent years the inmate population at Old Max has been plagued with violence and the fear of violence. *See* II App. Exh. 109; XXXVII R. 55-58, 61-64; and Brief of Appellant at 6-7. In May 1975 a major riot occurred at Old Max. In August 1976 the

Governor of Colorado ordered prison officials to conduct a massive lockup of the total prision population to help reduce the violence and other criminal activity which was ocurring inside the prison walls. *See* I App. Exh. 97, 108; XXXVII R. 66. In 1977 a special project team investigated Colorado's correctional system and concluded "that an environment of tension, anxiety, and fear exists for both inmates and correctional staff" at Old Max. II App. Exh. 15, 25. In June 1978 an interagency crisis committee, investigating attempted suicides in cellhouse 3, concluded that under the current conditions and staffing patterns, security could not be maintained in that cellhouse *Id.* at 114.

The violence and fear which permeated the prison population of Old Max in past years continues to exist. The efforts of many inmates are directed at merely staying alive while they serve their sentences. IV App. Tes. 118. Protective custody inmates are routinely threatened and attacked by other inmates. *See* XXVII R. 121-24; XXXVII R. 84; I App. Tes. 39. Prison records for 1978 and part of 1979 show a significant number of stabbings, assaults, fights, and threats. *See* II App. Exh. 227-47; I App. Tes. 79-87, 429-31; II App. Tes. 188-90. Undoubtedly many more incidents go unreported. *See* I App. Tes. 79, 429; II App. Tes 189.

The evidence indicates that the architecture of the cellhouses and the physical layout of buildings and other structures contribute to the violence and illegal activity between inmates. II App. Exh. 12, 26, 89-90, 97-100, 105,06, 110; IV App. Tes. 117; XXXIII R. 52-61; XXXVII R. 185. The architecture of cellhouses 1 and 7, which was designed for a less mobile prison population, does not provide adequate visibility for guards to properly monitor from secure vantage points inmate movement within the

cellhouse. *See* I App. Tes. 42-44, 389-90; II App. Exh. 97; XXXIII R. 58-61. The internal structure of the cellhouses along with the random construction of the buildings, walls, and fences within the perimeter of the prison provide numerous "blind areas" where violence, threats, and other illegal activities can occur without detection by prison officials. *See,* XXVII R. 95-97; I App. Tes. 42-43, 85-86, 431; IV App. Tes. 72, 113; II App. Exh. 89-90; XXXIII R. 52-61.

Violence and illegal activity between inmates at Old Max is further facilitated by the inadequacy of the staffing levels. Past investigations by the State revealed that staffing levels at Old Max were insufficient to provide adequate security for inmates and staff and that the lack of adequate supervision and surveillance of inmates contributes significantly to violence and other illegal activity. *See* II App. Exh. 12, 89-90, 97-100, 105-07, 111, 114. Despite the reports which highlighted the need for increased staffing at Old Max, the Colorado Department of Corrections actually decreased its security staff in fiscal year 1978-79. *See* Iv App. Tes. 1131. The expert witnesses, including the former executive director of the Department of Corrections, overwhelmingly concluded that current staffing levels at Old Max continue to be inadequate and cannot provide a reasonably safe environment for inmates.[18] *See* I App. Tes. 20-44.

[18]The district court did note that "violence at Old Max has been significantly reduced, [but that] the threat of occurrence is omnipresent." 485 F. Supp. at 155-56. Since violence has been "significantly reduced," appellants argue that "it cannot be said that the level of violence at the institution violates the plaintiffs' constitutional rights." Brief of Appellants at 62, 64. We disagree. Merely because the current level of violence and illegal activity is statistically lower than in past years does not mean that the present situation meets minimum constitutional standards. *See Finney v. Arkansas Bd. of Correction,* 505 F.2d 194, 201 (8th Cir.); *Holt v. Sarver,* 309 F. Supp. 362, 377 (E.D. Ark.), *aff'd,* 442 F.2d 304 (8th Cir.).

Although a larger security staff would not completely obviate the inmate safety problem the evidence shows that additional security personnel could significantly reduce it.[19] *E.g.*, I App. Tes. 21-22, 76-78; II App. Exh. 12. We are convinced that the record amply supports the finding that the State has been "deliberately indifferent" to the legitimate safety needs of the inmates confined at Old Max.[20] *See Palmigiano* v. *Garrahy, supra,* 443 F.Supp. at 973, 980; *see also Little* v. *Walker,* 552 F.2d 193, 197-98 n.8 (7th Cir.), *Cert. denied,* 435 U.S. 932. Accordingly we must uphold the court's finding and conclusion that the State has failed to reasonably protect inmates from constant threats of violence and assaults from other inmates and that this failure violates the inmates' constitutional rights under the Eighth Amendment.

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[19]If the appellants are suggesting, by their reference to their proposed 1981 budget, that they lack sufficient funds to increase the security staff at Old Max, we must reject their argument. The lack of funding is no excuse for depriving inmates of their constitutional rights. See *Smith v. Sullivan,* 611 F.2d 1039, 1043-44 (5th Cir.); *Campbell v. McGruder,* 580 F.2d 521, 540 (D.C. Cir.); *Battle v. Anderson, supra,* 564 F.2d at 395-96, 400; *Palmigiano v. Garrahy,* 443 F. Supp. 956, 979 (D.R.I.) and cases cited therein.

[20]Appellees claim that the "deliberate indifference" standard is applicable only in § 1983 damage actions against specific prison staff members. Brief of Appellee at 73-74. While it appears that a showing of deliberate indifference is not a prerequisite to obtaining the injunctive and declaratory relief sought here, *see Withers v. Levine,* 449 F. Supp. 473, 479 (D.Md.), *aff'd,* 615 F.2d 158, 162 (4th Cir.), *petition fo cert. pending,* No. 79-6535 (May 5, 1980), we need not reach this issue since the record here supports the finding of deliberate indifference.

4. Health Care

The district court found that "the blatant inadequacy of health care is perhaps the most appalling" of all the probblems at Old Max and that the State has "been aware of grave and systemic deficiencies in the medical care delivery system at Old Max for years." 485 F.Supp. at 142, 158. It concluded that:

> The failures of Old Max extend across the board from inadequate staff and resources to insufficient transportation arrangements to lack of training and qualification of the limited staff that does exist. The problem is not simply a matter of isolated incidents of alleged negligence or difference of opinion. It is a matter of such large scale failure as to evidence deliberate indifference to serious health needs.

Id. at 158.

The State argues that the district court "misconstrued the applicable law and failed to accurately reflect the evidence in the record." Brief of Appellants at 82, 117; Reply Brief of Appellants at 11-13. With respect to the medical care which is provided to inmates at Old Max, the State admits that deficiencies existed prior to 1977. However, it says that the "[h]ealth care provisions at . . . [Old Max] must be seen in a continuum"; that the general standard of care provided has been upgraded consistently and that the evidence shows that "[t]he medical facilities, equipment, and staff . . . [are] sufficient to deliver adequate medical care to the prison population." Brief of Appellants at 104, 115. The State further claims that the record does not show "deliberate indifference" by prison officials to inmates' medical needs and that the trial court's conclusion concerning the inadequacy of medical

care at Old Max is based on "isolated instances" of inadequate or improper medical care. *Id.* at 99-100.

With respect to mental health care, the State relies on *Bowring* v. *Godwin,* 551 F.2d 44 (4th Cir.) and maintains that the evidence shows that out of the entire prison population only 15 inmates were identified as being "seriously mentally ill." According to the State, the evidence did not show "that action by health care personnel could have made any appreciable difference in the condition of these [15] inmates." Furthermore, the evidence also failed to show that prison officials were deliberately indifferent to "inmates' serious psychological/psychiatric needs." Brief of Appellants at 107-09. Consequently the State argues that the court erroneously concluded that inmates at Old Max received constitutionally inadequate health care from the State.

As the State admits, it has a constitutional obligation "to provide medical care for those whom it is punishing by incarceration." *Estelle v. Gamble,* 429 U.S. 97, 103; Brief of Appellants at 97. We are convinced that this duty necessarily requires that the State "make available to inmates a level of medical care which is reasonably designed to meet the routine and emergency health care needs of inmates." *Battle v. Anderson,* 376 F.Supp. 402, 424 (E.D. Okal.); *accord, Laaman v. Helgemoe, supra,* 437 F. Supp. at 312. This includes medical treatment for inmates' physical ills, dental care, *see e.g., i.d.* at 313, and psychological or psychiatric care, *see e.g., Inmates of Allegheny Cty. Jail* v. *Pierce,* 612 F.2d 754, 7863 (3d Cir.), *on remand,* 487 F.Supp. 638, 643 (W.D. Pa.); *Bowring*v. *Godwin, supra,* 551 F.2d at 47.

Although the constitutional standard for adequate health care has not been fully spelled out, the Supreme

Court has held in the context of a §1983 action for damages and injunctive relief that only "deliberate indifference to serious medical needs" of prisoners violates the Eighth Amendment proscription against cruel and unusual punishment. *Estelle v. Gamble, supra,* 429 U.S. at 106; *see also Twyman v. Crisp,* 584 F.2d 352, 355 (10th Cir.). Consequently, accidental or inadvertent failure to provide adequate medical care, or negligent diagnosis or treatment of a medical condition do not constitute a medical wrong under the Eighth Amendment. *See Estelle v. Gamble, supra,* 429 U.S. at 105-06. *A fortiori,* a mere difference of opinion between the prison's medical staff and the inmate as to the diagnosis or treatment which the inmate receives does not support a claim of cruel and unusual punishment. *See e.g., Bowring v. Godwin, supra,* 551 F.2d at 48; *Smart v. Villar,* 547 F.2d 112, 114 (10th Cir.).

The two-pronged *Estelle* standard "requires deliberate indifference on the part of prison officials and it requires the prisoner's medical needs to be serious." *West v. Keve,* 571 F.2d 158, 161 (3d Cir.). A medical need is serious if it is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Laaman v. Helgemoe, supra,* 437 F.Supp. at 311; *See also West v. Keve, supra,* 571 F.2d at 162-63 n.6. Deliberate indifference to serious medical needs is shown when prison officials have prevented an inmate from receiving recommended treatment or when an inmate is denied access to medical personnel capable of evaluating the need for treatment. *See, e.g., Inmates of Allegheny Cty. Jail v. Pierce, supra,* 612 F.2d at 762; *Todaro v. Ward,* 565 F.2d 48, 52 (2d Cir.). In class actions challenging the entire system of health care, deliberate indifference to inmates' health needs may be shown by proving

repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff, *see id.* at 52, or by proving there are such systemic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care. *See, e.g., Inmates of Allegheny Cty. Jail v. Pierce, supra,* 612 F.2d at 762-63; *Todaro v. Ward,*

The record shows that the medical staff at the infirmary in Old Max is responsible for providing medical services for all the prison facilities in the Canon City area, including the maximum security prison, the medium security prison, and the women's prison — a total inmate population of approximately 1,400. XXV R. 82-83; XXXVIII R. 5, 100-01. In addition, the medical staff is responsible for the initial medical and dental screening of all new prisoners entering the Colorado prison system — approximately 1,350 inmates in 1978. XXXVIII R. 101, 104.

Despite the large number of prisoners who depend on the Old Max staff for medical services, the State provides less than 10 hours per week of on-site primary physician coverage. Expert witnesses agreed that a minimum of 40 hours per week of on-site primary care physician coverage is needed for the Maximum Security Prison (Old Max) to meet minimally acceptable standards of health care. *See* XXV R. 80-84, 90-92, 201; XXXVIII R. 75, 78-79, 101-02; Brief of Appellants at 85. One expert indicated that "primary care physician on-site coverage" is the "most important aspect of the medical care services at the facility" and that 10 hours per week is "*grossly inadequate.*" XXV R. 90 (emphasis added); *see also* I App. Tes 238; XXV R. 96; XXXVIII R. 74-75. Expert witnesses uniformly agreed that a four-fold increase in primary physician coverage was necessary, along with additional on-site coverage

from specialists. *See* XXV R. 92, 126-27, 200-02, 213; XXXVIII R. 74-78. The State's expert admitted that in order to meet minimally acceptable standards of health care, there must be at least 4 hours per week of on-site coverage from a general internist and a general surgeon, and 4 hours of on-site coverage every other week from an ear, nose, and throat specialist and an orthopedic surgeon. *See XXXVIII R. 76, 79; see also* XXV R. 126-27, 201. At the time of trial this specialist coverage was not provided.[21]

Experts from both sides agreed that because of the inadequacy of on-site primary physician coverage, other medical personnel are being used as "physician substitutes" and are being forced to make decisions and perform services for which they are neither trained nor qualified. XXV R. 90-98, 113-14, 127; XXXVIII R. 75; *see also* XXI R. 129. Experts agreed that the current practice of leaving "standing orders" – a system where the physician leaves instructions for handling a number of medical situations which may arise – could be "dangerous" and cannot substitute for adequate on-site physician coverage. XXV R. 172-74; Brief of Appellants at 86. One expert described a number of "typical" incidents where inadequately supervised medical staff have misdiagnosed or improperly treated inmates' medical conditions and have on occasion caused potentially life-threatening situations along with needless pain and suffering. XXV R. 99-125; *see also* I. App. Tes. 234, 270-73.

Prisoners generally have more extensive dental problems than the average citizen. Consequently dental care is

[21]The record does show that a certified radiologist comes to Old Max two days a week to perform diagnostic X-ray procedures and an optometrist comes once a week to perform optical examinations and prescribe glasses for inmates. XXXVIII R. 28-29, 44-45, 80-81.

one of the most important medical needs of inmates. XXV R. 133; XXXVIII R. 85, 113. In August 1978 the Old Max infirmary provided only 12 hours per week of on-site dental care by a licensed dentist. XXXVIII R. 35, 116. Prior to trial only 28 hours per week of on-site dental care was available at the Old Max infirmary — a level of coverage which experts agreed was inadequate to meet the needs of the prison population at Old Max. XXV R. 134, 182; XXXVIII R. 84-85. During the trial, the State increased the on-site dental care coverage at the Old Max infirmary to 40 hours per week which, according to the State's expert witness, is sufficient for an inmate population of 800 to 1,000. XXXVIII R. 35, 84-85. However, since the medical staff at Old Max is responsible for providing dental care for a prison population of approximately 1,400, along with screening a large number of new prisoners, dental care coverage remains inadequate to meet the needs of Old Max inmates. *See* XXXVIII R. 35, 113-117; *see also* II App. Exh. 8. This conclusion is further supported by evidence which shows that as of July 1979, inmates needing oral surgery had to wait an inordinant amount of time before receiving proper care and that these inmates when not treated in a timely fashion are prone to develop infections and abscesses leading to continued and unnecessary pain and loss of teeth. XXV R. 135.

In addition to the physicians and dentists, the medical staff at the Old Max infirmary includes three Physician's Assistants (PA's), three Registered Nurses (RN's), one licensed practical nurse (LPN) and one nurse practitioner. XXV R. 89, 136, 170; XXXVIII R. 39-40, 44, 109. Although the infirmary is open 24 hours a day, seven days a week, PA's are scheduled only five days a week. However, at least one PA is "on call" during the hours when there are none in the infirmary. *Id.* at 41-44. Expert

testimony indicated that there is a "definite need" for several more PA's. XXV R. 90; *see also* XXI R. 142-43. The evidence also indicates that there is no Registered Nurse working the late night shift, notwithstanding a state health department regulation requiring that an RN be on duty 24 hours a day. XXV R. 136-38; XXXVIII R. 109; II App. Exh. 5; Brief of Appellant at 86.

While there was some dispute by the experts as to the proper scope of medical services which should be provided by the staff at the infirmary, it is clear from the evidence that in order to meet the needs of inmates the medical staff must currently rely on medical services provided by civilian health care facilities. *See* XXXVIII R. 46-48, 56. Consequently an integral part of the prison health care program is the transportation of inmates to and from the locations where the medical care is given. *See* XXV R. 128-29. At the time of trial the medical department at Old Max did not have any securityy staff or vehicles assigned to it solely for the purpose of transporting inmates to health facilities. The one prison vehicle used for transporting inmates to outside health facilities is also used for transporting prisoners to court. The lack of staff and vehicles often results in cancellation of planned medical trips in order to transport inmates to court. Transportation cancellations result in a serious backlog of prisoners who are waiting to be sent to outside facilities for needed care. I App. Tes. 254; II App. Exh. 6-7; XXV R. 128-29; XXXVIII R. 48-49, 78, 121, 128-29.

Expert witnesses uniformly recognized that transportation problems exist which unnecesarily delay the delivery of health care services to inmates. *See* I App. Tes. 254; IV App. Tes. 130; XXV R. 128-33; XXXVIII R. 48-49, 78, 126-31. One prison official who is directly responsible for

health care at Old Max testified that the medical department needed to have its own staff to transport prisoners to the prison infirmary and the outside health facilities. More importantly, this prison official admitted that the medical staff has an "essential need" for at least 6 additional officers along with 2 cars which are used exclusively for transporting prisoners to outside medical facilities. *See* XXXVIII R. 48-49, 130-31.

Undoubtedly because of the lack of civilian staff, the State has permitted inmates to be used in delivering health care services to the inmate population. The evidence shows that inmates are used as lab technicians, dental assistants, orderlies, X-ray technicians, and as file clerks in the medical records department. XXV R. lk138; XXXVIII 28-30, 33-34, 37, 45-46, 87, 120-23; II App. Exh. 5, 91. Expert testimony indicated that "virtually all" existing standards on health care in correctional institutions prohibit the use of inmate personnel in providing direct health services to other inmates. XXV R. 139.

Dr. King, attending physician in the Department of Medicine at the Cook County Hospital in Chicago and Assistant Profesor in the Department of Community Health and Preventive Medicine at Northwestern University, testified after reviewing the medical services provided at Old Max. He concluded that: *"Given the types of staffing and the types of other resources such as transportation, certain equipment deficiencies, I do not believe that they [the defendants] are able to provide minimally adequate basic medical care." XXV R. lk158, 72.* (Emphasis added). A State expert concluded that additional personnel and equipment were necessary to provide adequate medical care at the Old Max infirmary. XXXVIII R. 90.

Inadequate staffing also negatively affects the delivery

of reasonable mental health care to those inmates who are seriously mentally ill. Experts estimated that 5-10% of the inmates at Old Max are "seriously mentally ill" and that another 10-25% need treatment although they are not seriously ill. I App. Tes. 229-31, 245, 373; XXV R. 176; *but see* XXXI R. 68. One expert found that there are clearly more inmates at Old Max who need psychiatric or psychological treatment than are receiving it. I App. Tes. 231-32. Another expert concluded that the "[m]ental health service at Old Max is extremely limited and totally incapable of providing the mental health care of those who have been identified as having severe, chronic or acute disorders . . . ." II App. Tes. 191; *see also* I App. Tes. 245-46, 376, 382-83; II App. Tes. 301. The lack of adequate mental health services, according to this expert, contributes to inmate suffering and at times causes suicide and self-mutilation by inmates. II App. Tes. 209; *see also* I App. Tes. 233-35, 254-55.

As the State admits, there is no on-site psychiatrist or licensed Ph.D. psychologist at Old Max to provide daily care and counselling for inmates. A psychiatrist from the state reformatory is scheduled to visit Old Max once a month, but in the year before trial had only come once every two months. One expert found that this level of psychiatric coverage is "ridiculously pathetic" considering the number of "clearly recognizable seriously ill people" at Old Max. I App. Tes. 233; *see also* II Ap. Tes. 198.

Efforts to obtain further psychiatric coverage have been frustrated due to the lack of funding. XXXI R. 138-39. In fact psychiatric coverage has been cut back in order to increase dental and optometric coverage. XXV R. 112, Experts uniformly agreed that for Old Max to have a minimally adequate mental health program it needed at

least one full time psychiatrist. I App. Tes. 255-56; II App. Tes. 192, 196-97.

At the time of trial the regular mental health staff at Old Max consisted of three civilians and two inmates who do clerical work. XXXIV R. 80, 116. The clinical staff members apparently spend more of their time on administrative work than on the treatment of ill inmates. *See* XXXI R. 90; XXXIV R. 80. Once an inmate is placed on a waiting list, it takes anywhere from 2-5 weeks before he is seen by a member of the mental health staff. *Id.* at 185. One expert witness found that the mental health staff is overworked, undertrained, and underqualified. II App. Tes. 200-09. Both experts who testified on mental health matters found that the work by individual staff members was not being competently handled. I App. Tes. 225-26; II App. Tes. 209.

Considering the evidence as a whole, we must hold that the district court was not in error in finding that the medical and mental health staffs of Old Max are "grossly inadequate." Because of the staff shortages inmates are effectively denied access to diagnosis and treatment by qualified health care professionals. Such conditions endanger their health and well being, make unnecesary suffering inevitable, and evidence on the part of the State a deliberate indifference to the serious health needs of the prison population. Accordingly, we must uphold the district court's findings and conclusion that the State has subjected the plaintiff class to cruel and unusual punishment in that it has denied them access to reasonably adequate health care.[22]

[22]As noted earlier because of the deep concern of the panel as to this problem, we did not stay the provisions of the district court's order pertaining to health care. Our full review of the case reenforces our concerns on this medical care question which is of paramount importance.

IV

Restrictions on Visitation

In addition to the Eighth Amendment violations, the district court found that prison visitation policies "are overbroad and prevent or impair meaningful visitation without being necessary to any legitimate penological purpose" and do not take into consideration individual circumtances. 485 F.Supp. at 1162. It was further found that the current restrictions on visitation "are an exaggerated and excessive response to concerns for prison security." *Id.* The court held that these policies improperly infringe upon inmates' fundamental rights of association, privacy, and liberty which are protected by the First, Ninth, and Fourteenth Amendments. *Id.* at 150-51, 161-62.[23]

The State argues that the court ignored well established law, erroneously cited professional and other standards to establish constitutional minima, and improperly relied on a line of cases dealing with the sanctity of the family which is inapplicable in a prison setting. The State says that since 1976 visitation policies have gradually been relaxed, new policies and regulations enhance the visitation process, all inmates except those in segregated units are permitted contact visits, and the restrictions presently imposed are constitutional since they "are clearly justified by the legitimate policies and goals of the correctional system." Brief of Appellants at 1125-29.

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[23]Under the general heading "Access," the district court held that certain prison policies concerning visitation, mail, and the law library violated inmates' constitutional rights. The issues of restrictions on prisoners' mail are discussed below in Part V, *infra*, while the issues of access to the courts and the prison law library are treated in Part VI, *infra*.

When confronted with the question whether inmates have a constitutional right to receive visits from family and friends, courts have reached varying results. *See, e.g., White* v. *Keller,* 438 F.Supp. 110, 114-19 (D. Md.), *aff'd,* 588 F.2d 913 (4th Cir.); *Laaman* v. *Helgemoe, supra,* 437 F.Supp. at 1320-22 and cases discussed therein. However we need not decide this basic issue since the district court did not find, nor is it claimed by the plaintiffs, that prison officials are denying visitation entirely.

Assuming that such a right exists, the Supreme Court has made it clear that "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Pell* v. *Procunier,* 417 U.S. 817, 822; *accord, Jones* v. *North Carolina Prisoners' Union,* 433 U.S. 119, 125; *See generally Daughtery* v. *Harris,* 476 F.2d 292 (10th Cir.), *cert. denied,* 414 U.S. 872. A corollary in the context of a First Amendment claim "is that a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."[24] *Pell* v. *Procunier, supra,* 417 U.S. at 1822. We think that the underlying principle of this corollary is also applicable to rights which are guaranteed by other constitutional provisions. *See Bell* v. *Wolfish, supra,* 441 U.S. at 1544-48, 554; *Jones* v. *North Carolina Prisoners' Union, supra,* 433 U.S. at 125, 129.

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[24]Legitimate penological objectives thus far identified by the Supreme Court include "the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners." *Procunier v. Martinez,* 416 U.S. 396, 404 412; *see also Bell v. Wolfish,* 441 U.S. 520, 546-47; *Pell v. Procunier, supra,* 417 U.S. at 822-23 (deterrence of crime is an important function of the corrections system along with rehabilitation and security).

When an institutional restriction infringes on a specific constitutional right, the prison policy must be evaluated in light of the legitimate objectives of penal administration security, order and rehabilitation. *See Bell* v. *Wolfish, supra,* 441 U.S. at 520. And when the policy in question involves the entry of people into the prison for face-to-face contact with inmates, security and related administrative considerations are sufficiently paramount to justify the imposition of some restrictions on such visits. *Pell* v. *Procunier, supra,* 417 U.S. at 826-27; *see also Jones* v. *North Carolina Prisoners' Union, supra,* 433 U.S. at 125-26. Becuse the running of a penal institution is both complex and difficult, prison administrators are to be "accorded wide-ranging deference" in adopting and executing policies and practices which, in their judgment, are necesary to preserve internal order and discipline and to maintain institutional security. *Bell* v. *Wolfish, supra,* 441 U.S. at 547; *Jones* v. *North Carolina Prisoners' Union, supra,* 433 U.S. at 1126. "Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Pell* v. *Procunier, supra,* 417 U.S. at 1827; *accord, Bell* v. *Wolfish,* 441 U.S. at 1547-48; *Jones* v. *North Carolina Prisoners' Union, supra,* 433 U.S. at 128.

The regulations being challenged here permit each inmate a total of 5 full days or 10 half days of visiting privileges per month. Visits by attorneys are not counted against inmate visiting days. Prisoners are permitted visitors on specific days between Thursday and Sunday. All visitors must be on an approved visitors list which is

generally limited to the inmate's immediate family.[25] If an inmate has no immediate family residing in Colorado, he may have 3 non-family visitors on his approved list, which is limited to 13 persons. Changes in individual visiting lists may be made each 60 days. VII Supp. R. Pl. Exh. No. 128 at 2-4; Def. Exh. No. 1107.

Because of security problems which existed with open visitation, prison officials, beginning in 1976, did not permit inmates to have physical contact with their visitors. IV App. Tes. 128-29. Instead, inmates and their visitors sat in booths with glass partitions between them and spoke with each other through telephones. In July 1979, prison officials removed the glass partition in many booths to permit limited physical contact between inmates and visitors. With the exception of those inmates confined in segregated units, who must use the partitioned booths,[26] inmates may now kiss their visitors at the beginning and conclusion of a visit. They may hold hands with their

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[25]The regulation provides that an inmate's "immediate family includes spouse, common-law spouse, fiance if inmates are respectively not married, children, stepchildren, grandparents, siblings, stepsiblings, or legal guardian, parents, and step parents." VII Supp. R. Pl. Exh. No. 128 at 3.

[26]Because this part of the plaintiff class is denied contact visitation privileges, the question of whether such visits are mandated by the constitution is properly presented. Although the Supreme Court has not addressed this particular issue, *see Bell v. Wolfish, supra,* 441 U.S. at 559-60 n. 40, we think the weight of present authority clearly establishes that there is no constitutional right to contact visitation. *See, e.g., Feeley v. Sampson,* 570 F.2d 364, 373 (1st Cir.); *Oxendine v. Williams,* 509 F.2d 1405, 1407 (4th Cir.) (per curiam); *Lock v. Jenkins,* 464 F. Supp. 541, 550 (N.D. Ind.); *Owens-El v. Robinson, 457 F. Supp. 984, 988 (W.D. Pa.), aff'd in part, rev'd in part sub nom., Inmates of Allegheny City. Jail v. Pierce,* 612 F.2d 754, 758-60 (3d Cir.); *see also White v. Keller, supra,* 438 F.Supp. at 114-19. We agree with this view.

visitors and may hold small children on their laps. Any other type of bodily contact is prohibited. I App. Tes. 402; XXXVIII R. 117; VII Supp. R. Pl. Exh. No. 128 at 7; Def. Exh. No. 1107; Brief of Appellants at 128.

As noted, the district court found that these regulations were overbroad, unrelated to any legitimate penological purpose, and an exaggerated and excessive response to concerns for prison security. We cannot agree with the trial court's conclusions on this subject.

There can be no doubt that contact visits between inmates and their visitors provide a unique opportunity for passing contraband, including weapons and drugs, into the prison. *See Feeley* v. *Sampson, supra,* 570 F.2d at 373; *see generally Woods* v. *Daggett,* 541 F.2d 237, 240 (10th Cir.); *Daughtery* v. *Harris, supra,* 476 F.2d at 294. Prison officials have chosen to permit limited contact visitation for most inmates as opposed to some other method of countering a known security problem. This decision should be accorded deference so long as it is a reasonable response to the legitimate concerns of prison security. The existence of less restrictive alternatives is not dispositive of the matter, *see, e.g., Inmates of Allegheny Cty. Jail* v. *Pierce, supra,* 612 F.2d at 759; *Feeley* v. *Sampson, supra,* 570 F.2d at 373, for we are convinced that the discretion of prison officials in these matters should stand unless patently unreasonable.

We cannot say that this record "conclusively" shows that the prison officials were wrong in considering unlimited contact visitation a threat to the security and order of the prison. *See Bell* v. *Wolfish, supra,* 441 U.S. at 555. Nor is there any basis in the record for saying that the restrictions imposed on contact visitation are irrational. In fact the record shows that the current restrictions on con-

tact visitation have been successful in discouraging the transfer of contraband between inmates and their visitors. *See* I App. Tes. 404; *cf. Bell* v. *Wolfish, supra,* 441 U.S. at 559.

With respect to the regulation allowing three non-family visitors to be on an inmate's approved visiting list only when the inmate does not have immediate family residing in Colorado, we think that the regulation is a rational response to legitimate penal concerns. The current regulation permits inmates to have personal contact with those individuals whom prison officials believe are most likely to aid in their rehabilitation, while keeping visitations at a manageable level that will not jeopardize institutional security. *See Pell* v. *Procunier, supra,* 417 U.S. at 827. Those prisoners who have immediate family in Colorado may still communicate with non-family friends by using the mails or by communicating to these individuals through the family members and attorneys who are permitted to visit them. *See id.* at 823-25 & n.4. So long as these alternative channels of communication are open to prison inmates, we think that the numerical and qualitative restrictions on inmates' visitors are not unreasonable. *See id.* at 827-28.

Accordingly, the trial court's ruling on the visitation regulations must be set aside.

V

Restrictions on Prisoners' Mail

Under the subject of "access" the trial court dealt with several regulations concerning prisoners' mail. It was held that certain prison censorship rules complied with the requirements of *Procunier* v. *Martinez,* 416 U.S. 396,

418-19; that in case of rejection of a letter to or from an inmate, the writer must be given an opportunity to protest the decision; that complaints thereon be referred to a prison official other than the one who originally disapproved the correspondence; and that notice that correspondence has been rejected must contain a brief but adequate explanation, with rejected correspondence being returned to the sender. The trial judge also upheld the regulation prohibiting the receipt of periodicals and other materials not mailed directly from the publisher or an established vendor or distributor. 485 F.Supp. at 163. No appellate issue is raised as to these rulings.

However, other mail restrictions were held invalid by the trial court. First, it was found that there is a policy of refusing to deliver mail in a language other than English; that one-third of the population at Old Max is Hispanic; that "[n]umerous prisoners lack speaking, reading and writing skills in English, as do many of their correspondents"; and that the English language rule seriously infringed protected First and Fourteenth Amendment interests without being necessry to any legitimate penological purpose. 485 F.Supp. at 151, 164. Beyond the general argument that the trial court's order intrudes on prison administration, there is no argument or authority presented in defense of this language discrimination by the State with respect to correspondence. We must agree with the trial court that the policy as applied infringes on the constitutional rights of the defendants, without any reasonable justification furthering an important or substantial state interest. *See Procunier* v. *Martinez*, 416 U.S. 396, 413.

Second, the court found that there is a policy of refusing to deliver mail when correspondence would allegedly cause severe psychiatric or emotional disturbance to an inmate. CCF Reg. 302-18(7)(b). The trial court found that

such a restriction is not wholly unreasonable on its face, but that there is an anomaly in that there is no qualified psychiatrist or psychologist at the prison to make a decision whether receipt of certain correspondence would cause such disturbance. The court ruled that until there is such personnel to apply the rule, it is void and may not be applied. Again, there is no specific defense of this restriction by the State, nor any authority or evidence presented to justify the application of the rule while the medical personnel deficiency exists. We feel again that, in the circumstances, the order of the trial court was not in error in restraining the enforcement of the restriction until qualified personnel is available to apply the rule. *See Guajardo* v. *Estelle,* 580 F.2d 748, 757 (5th Cir.).

Third, the trial court found that the prison regulation does not make clear that in those exceptional circumstances when outgoing privileged (legal) mail may be opened, it can only be opened in the presence of the sending inmate. The court held that such presence of the sender is required when the opening of his mail occurs. 485 F.Supp. at 164. In this instance also there is no specific defense of the prison policy and we agree again with the ruling of the trial court. *See Hardwick* v. *Ault,* 447 F.Supp. 116, 129-30 (M.D. Ga.); *see also Gates* v. *Collier,* 501 F.2d 1291, 1310-14 (5th Cir.); *Carty* v. *Fenton,* 440 F.Supp. 1161, 1163 (M.D. Pa.) (incoming privileged mail must be opened in the presence of the inmate).

Fourth, the trial court found that in defining "legal mail," the regulations state that such mail is "any mail directed between an inmate and any public official or agency or any lawyer with respect to either his criminal conviction *or a complaint he might have concerning the administration of the prison under exceptional circumstances."* CCF Regulation 302-18(6) (emphasis

added). The court found that the latter qualification is not allowable. 485 F.Supp. at 164. No authority or record evidence is cited by the State as a specific defense of this regulation. We therefore sustain the trial court's ruling, holding invalid the restrictive definition of legal mail quoted above. The protection afforded to legal correspondence applies equally to criminal and civil matters, and privileged correspondence with counsel, public officials, and agencies cannot be thus confined. *See Guajardo* v. *Estelle,* 580 F.2d 748, 758 (5th Cir.).

In sum, we must agree that in the particulars discussed the restrictions on prisoners' mail are invalid under the First and Fourteenth Amendments, being unjustified under the standards laid down by the Supreme Court in *Procunier* v. *Martinez, supra,* 416 U.S. at 413. We accordingly affirm the rulings of the district court in these respects.

VI

Access to the Courts

The district court found that the three law libraries at Old Max "fall below any known acceptable standard." *Ramos* v. *Lamm, supra,* 485 F.Supp. at 151. More specifically the court found that the general population library contains approximately half the volumes recommended by the American Association of Law Libraries Committee on Law Library Services to Prisoners; that this library consists mainly of outdated advance sheets, pocket parts, and discards from other sources; and that the separate law libraries for protective custody inmates in cellhouse 7 and for segregated inmates in cellhouse 3 have fewer materials and are far more inadequate than the general population library.

With respect to the staffing of these facilities, the court found that while there is inmate assistance available for those inmates who need help, there is no civilian staff with legal or paralegal training to supervise the libraries or to assist inmates with research. The court also found that the law libraries are open five days a week, that prison regulations permit only 13 inmates to use the law library facilities each day (65 inmates per week), that each library visit is limited to a maximum of three hours, and that with the current inmate population at Old Max, a prisoner may have access to a prison law library for only three hours every 13 weeks. *Id.* at 151-52, 165-66. Considering the prison's facilities and rules as a whole, the district court held that inmates are not provided with "meaningful access to the courts." *Id.* at 166.

The State argues that the trial court erred in finding that the law library facilities and the library regulations at Old Max are constitutionally defective; that existing facilities "far exceed" those which were approved by the Supreme Court in *Bounds* v. *Smith,* 430 U.S. 817; and that there was no evidence, showing a pattern or practice by prison officials of denying inmates access to legal materials, library facilities or the courts, or showing that any inmate had been prejudiced (*i.e.,* by dismissal of a case) or substantially harmed due to current prison regulations or facilities. Brief of Appellants at 1129-34.

It is now clear that inmates have a constitutional right to "adequate, effective, and meaningful" access to the courts and that the states have "affirmative obligations" to assure all inmates such access. *Bounds* v. *Smith, supra,* 430 U.S. at 822, 824. In *Bounds* the Supreme Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing

prisoners with adequate law libraries or adequate assistance from persons trained in law." *Id.* at 828. However the ruling in *Bounds* does not hold that inmates have an absolute right to any particular type of legal assistance. *See Williams* v. *Leeke,* 584 F.2d 1336, 1339 (4th Cir.), *cert. denied,* 442 U.S. 911. The states are still free to choose among a variety of methods or combinations thereof in meeting their constitutional obligations. *See Bounds, supra,* 430 U.S. at 1830-32.

Under some circumstances, however, even the existence of an adequate law library will not satisfy the State's constitutional duty. *See Id.* at 823-24 & n.10-11; *Twyman* v. *Crisp,* 584 F.2d 352, 357 (10th Cir.); *Glover* v. *Johnson,* 478 F.Supp. 1075, 1096 (E.D. Mich.); *Wade* v. *Kane* 448 F.Supp. 678, 684 (E.D. Pa.) *aff'd without opinion,* 591 F.2d 1338 (3d. Cir.); *see also Battle* v. *Anderson,* 614 F.2d 251, 255 (10th Cir.); *Wetmore* v. *Fields,* 458 F.Supp. 1131, 1142-43 (W.D. Wis.). The existence of prison regulations that limit an inmate's access to the law library or that limit the time, place, and manner in which he can engage in legal research or preparation of legal documents must be considered. *See Twyman* v. *Crisp, supra,* 584 F.2d at 358; *Elkanich* v. *Alexander,* 315 F.Supp. 659, 662 (D.Kan.), *aff'd,* 430 F.2d 1178 (10th Cir.) (per curiam); *see generally* annot., 23 A.L.R. Fed. 1, k128 (1975 & Supp. 1979). In order to properly evaluate existing conditions, courts must consider the regulations, facilities, and available resources together as a whole, remembering that "meaningful access" is the touchstone of this constitutional guarantee. *See Bounds, supra,* 430 U.S. at 823, 832; *Twyman* v. *Crisp, supra,* k584 F.2d at 357-58.

Here the record shows that the State has chosen to provide both law libraries and inmate assistance. Old Max has three law "libraries," each serving a different segment of

the inmate population. The library in cellhouse 3 is used exclusively by the inmates in that building. Cellhouse 7 library is for the exclusive use of protective custody inmates in that building. The remainder of the prison population, except for inmates housed in the Diagnostic Unit, is permitted to use the general population law library. Inmates in the Diagnostic Unit do not have direct access to any law library facility.[27] XXXI R. 7-8; XXXIX R. 26-27, 58-59; VII Supp. R. Pl. Exh. No. 36 at 1.

Current regulations indicate that the general population law library is open 12 1/2 hours a day, five days a week and that the library in cellhouse 3 is open four hours a day, five days a week. *Id.* at 1; *see also* Brief of Appellants at 133; Brief of Appellees at 141. The testimony at trial, however, indicated that during the summer months the libraries are closed in the evenings. XXXIV R. 24-25. The record does not show that any regulations currently exist for the use of the library in cellhouse 7, although the State claims that it is open the same number of hours as the cellhouse 3 library. The absence of regulations for this library is possibly due to the fact that it was just being stocked with books at the time of trial and was not in operating order prior to that time. *See* Brief of Appellants at 132; XXXIX R. 26-27.

The record also shows that prison officials permit a maximum of six inmates to use the general population library at one time, while only one inmate is allowed to use the library in cellhouse 3 at any one time. Library time is allocated among inmates by the prison's school supervisor based on daily requests from inmates. Priority is given to

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[27]The record does show that an inmate library clerk visits the Diagnostic Unit one morning every week to help inmates with their legal needs. XXXI R. 7-8; XXXIX R. 27, 58-59.

inmates facing court deadlines. Inmates are limited to approximately three hours or less per visit. Regulations prohibit inmates from checking out legal materials from the library.[28] At the time of trial, an inmate requesting use of the general population library normally could obtain access the same day. Waiting lists in the past have required inmates to wait no longer than a week. Apparently the State has kept no records on inmate use of the libraries in cellhouse 3 and 7.

The law books available to inmates vary, depending on the library being used. The evidence shows that the library in cellhouse 3 has only a few volumes of the Federal Reporter (2d series) and the Federal Supplement. The State admits that the cellhouse 7 library "contains approximately the same materials as the library in cellhouse 3." *Id.* A prison library which lacks these basic materials is an inadequate law library. *See Wade* v. *Kane, supra,* 448 F.Supp. at 682; *see also Bounds, supra,* 430 U.S. at 819-20 n.4. Consequently, we must agree with the district judge who saw the facilities that the law libraries in cellhouses 3 and 7 fall below acceptable standards and cannot alone provide inmates with meaningful access to the courts.

The general population law library is the largest of the three law libraries at Old Max. Its book collection consists mainly of paperback advance sheets and other outdated material. An evaluation of this library, prepared by an

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[28]The regulations do permit inmates, absent compelling reasons to the contrary, to purchase law books or other legal materials from the primary sources of supply (*i.e.*, the publisher). These purchased items may apparently be kept by the inmate in his cell. *See* VII Supp. R. P. Exh. No. 39 at 5-6.

outside source at the request of the State in 1978, determined that many of the volumes were unusable and should be discarded. This same report concluded that the book collection is "wholly inadequate" to meet the minimum standards of the American Association of Law Libraries Committee on Law Library Service to Prisoners – standards which the Supreme Court found relevant in *Bounds, supra,* 430 U.S. at 819-20 n.4. The State's most recent inventory of the library's law books shows that volumes are missing throughout its collection of federal decisions (*i.e.,* Reports, Supreme Court Reporter, Federal Reporter, 2d Series, and Federal Supplement). *E.g.,* VII Supp. R. Pl. Exh. No. 37 at 11, 22; VIII Supp. R. Def. Exh. No. 1123 at 1-10. Consequently we must agree with the trial judge that the general population library is inadequate and does not meet the needs of the inmates who use it.

Concluding that the prison's law libraries are inadequate does not end our inquiry. We must also consider the adequacy of alternative methods which the State has adopted to satisfy its constitutional duty of affording inmates meaningful access to the courts. The record shows that the State has allowed 3 inmate law library clerks to provide assistance to those inmates who request help. XXIX R. 26-29. However there are no specific findings concerning the training or competence of these library clerks and the State has not pointed to any record evidence which would show these critical factors.[29] Consequently we think that

[29]One defense witness did state that he "believed" the inmate library clerks knew "how to use the books." XXXIX R.25. This evidence does not show, however, that the library clerks are capable of helping any inmate draft a legal document. More importantly, this evidence does not show that the library clerks are capable of helping the large number of prisoners who, as the district court found, are unable to speak, read, or write in English. 485 F. Supp. at 151.

the State has failed to demonstrate that it has furnished an adequate alternative means of access to the courts for the inmates. *See Buise v. Hudkins,* 584 F.2d 223, 228 (7th Cir.), *cert. denied,* 440 U.S. 916; *Cruz v. Hauck,* 515 F.2d 322, 332 (5th Cir.), *cert. denied,* 424 U.S. 917; *compare Hampton v. Schauer,* 361 F.Supp. 641 (D.Colo.). In this connection we note that there is no evidence that the inmate library clerks have access to any law library facility other than the inadequate ones at Old Max. Even an individual highly trained in the law would be unable to provide competent assistance to others if forced to depend solely upon the inadequate law libraries at Old Max.

Accordingly, we sustain the district court's finding and conclusion that the State has denied the inmates meaningful access to the courts in violation of their constitutional rights.

VII

The remedy and disposition of this appeal

To remedy the constitutional violations found the district court ordered that the Old Max facility be closed. However, the execution of the order was temporarily stayed on the condition that the State would take immediate steps to provide the plaintiff class "with the basic human needs" which the court had identified in its opinion, and that the State would present a detailed plan setting forth the means by which it would protect the plaintiff class from further constitutional violations. The State's plan, according to the district court, was to be "in furtherance of, but not necessarily limited to" five enumerated principles – the principles of productive activity, motility, health, integrity and safety, and coherence. Future stays were contingent upon and State's compliance with these conditions. 485 F.Supp. at 169-70.

Subsequently, in denying the State's motion for a stay of execution of the judgment pending an appeal, the court explained its earlier order:

> All that the remedy requires, in essence, is that the state develop its own plans and make good faith immediate and continuing efforts to implement those plans so that the numerous constitutional violations set forth in my memorandum opinion and order will neither be repeated nor advanced.

Id. at 175.

The State argues on this appeal that the district court abused its discretion in its choice of remedy. Specifically it claims that the order of closure was the most intrusive action the court could have taken, that since 1977 it has been moving in a rapid manner to change its prison system, and that since 1978 it has been working according to a five year master plan, introduced into evidence, to insure that this change will take place in an orderly manner. Brief of Appellants at 141-47.

The Colorado General Assembly, as amicus, states that its good faith efforts to eliminate undesirable prison conditions are well established in the record which shows, according to the amicus, appropriations of nearly $22,500,000 between 1976 and 1979 for the State's prison system, including an allocation of major funds for the construction of an entirely new maximum security and close security facility. The amicus claims that this evidence amply demonstrates that it "has embarked on a plan, which is being funded and implemented, and which will result in the substantial modification of the correctional system in Colorado." Brief of Amicus Curiae at 14-15.

During the oral argument of this appeal, the State claimed that the new prison facility will be completed and occupied within a matter of months. The amicus makes a similar claim in its appellate brief. Reply Brief of Amicus Curiae at 6. In an authorized post-argument response to this contention, the appellees claim that there are conflicting reports on this point and that if "developments in the construction of the new facilities are relevant to the remedy in this case, these developments should be presented in the first instance to the district court." Letter of Appellees' Counsel, filed 67/9/80.

We must agree that the developments in the construction of the new prison facilities are extremely relevant in fashioning an appropriate remedy for the constitutional violations which exist in this case. *See Holt v. Sarver,* 442 F.2d 304, 309 (8th Cir.). And while the scope of a district court's equitable powers to remedy constitutional violations is "broad," *see Hutto v. Finney,* 437 U.S. 678, 687 n.9 we have noted before that the exercise of this power is necessarily tempered by the public interest involved. *See BAttle v. Anderson,* 594 F.2d 786, 793 (10th Cir.); *Gates v. Collier,* 407 F.Supp. 1117, 1120-21 (N.D. Miss.).

It is common ground that the State of Colorado has appropriate large amounts of money for the construction of a new correctional facility to accommodate the inmates of Old Max and that this construction has been underway for some time. *See* I App. Exh. 96-107.[30] The amicus points out that recent legislation has authorized funds for 90 *new* staff positions to coincide with the opening of both the

[30]The district court's opinion in December 1979 referred to the fact that Colorado has appropriated funds to build a new maximum security prison and a new close security prison, and that opening of these facilities is not scheduled until January or February 1981. 485 F.Supp. at 134.

new maximum and the close security facility. The vast majority of these new positions will be used for new security, housing and medical personnel. Reply Brief of Amicus Curiae at 8.

The district court entered its Rule 54(b) order and an immediate appeal of the court's December 1979 order followed. The appeal is now decided in this court, with the rulings on constitutional violations sustained [in] part and vacated in part. However, it is apparent that events have moved forward, that new measures have been taken, and whether the remedial order should stand or be modified should be reconsidered after further proceedings in light of changed conditions and this opinion.

For these reasons we feel that the case should be remanded for the district court to reconsider the proper remedy in light of the present state of conditions, as was done in the *Battle* controversy involving the Oklahoma penitentiary. *See* 594 F.2d 786, 793. On remand the district court should consider, *inter alia,* the present status of the new facility, the specific plans to which the State is committed for the transfer and housing of inmates in the new facilities, the specific commitments for enlarged staff personnel to remedy the deficiencies in personnel that have been found, and the actual progress made in these areas. The district court should conduct any necessary further proceedings for the development of the facts on the status of these matters and on actions required to eradicate the constitutional violations found, with respect to those violations on which the district court's rulings are upheld herein.

VIII

Conclusion

In sum, we hold: (1) that the district court did not err or abuse its discretion in refusing to abstain from deciding the merits of this case; (2) that the district court's findings were not in error as to the Eighth Amendment violations at Old Max in the areas of shelter, sanitation, food, safety, and medical care and in the finding of a violation of the inmates' constitutional right of access to the courts, due to the inadequate law library facilities and the restricted access permitted to them; (3) that the provisions of the district court's remedial order on motility, classification, and idleness, are vacated, as provided in Part III A, *supra*; (4) that the findings and judgment holding unconstitutional the prison's visitation regulations and policies are vacated; (5) that the ruling holding invalid and unenforceable four of the restrictions on inmates' correspondence was not in error and is sustained; and (6) that the remedial order is vacated and the cause remanded for further proceedings.

SEPTEMBER TERM - NOVEMBER 10, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges.

FIDEL RAMOS, DAVID LEE ANDERSON, SADIKI LISIMBA AJAMU (a/k/a Eugene Collins), ALEXANDER ROSES, MARK J. MENCHETTI and LESTER LAZENBY, et al., Plaintiffs-Appellees,	)	
vs.	)	No. 79-2324
THE HONORABLE RICHARD D. LAMM, Governor of the State of Colorado; JAMES G. RICKETTS, Executive Director of the Dept. of Corrections; JOHN PERKO, Director of Div. of Adult Services of Colo. Dept. of Corrections; EDGAR FOX, Dir. of Div. of Correctional Industries of Colo. Dept. of Corrections and WILLIAM WILSON, Supt. of Max. Sec. Unit (Warden). Defendants-Appellants.	)	

ORDER ON REHEARING

The court has for consideration a petition for rehearing with a suggestion for a rehearing en banc of the plaintiffs-

appellees, a petition for rehearing of the defendant-appellants, a motion of defendants-appellants to supplement the record with an objection thereto, a motion of plaintffs-appellees to issue the mandate forthwith and an objection thereto, and a bill of costs of plaintiffs-appellees and an objection thereto. The hearing panel, Judges Holloway, Barrett and Logan, ordered responses to the petition for rehearing en banc of plaintiffs-appellees and to the petition for rehearing of the defendants-appellants, which responses are now also before the court.

Turning first to the petition for rehearing of the defendants-appellants and the response thereto, the panel finds that only one matter calls for any discussion. The defendants-appellants have strenuously objected to the court's opinion which cited numerous stipulations as support for findings and conclusions of the trial court, contending that these stipulations were not actually made by the State and admitted in evidence. Without deciding whether the stipulations were approved and in evidence, the panel is convinced that in any event the whole of the evidence, exclusive of the stipulations, amply supports all the findings and conclusions of the trial court generally, as well as with respect to the mental and physical health of the inmates which is the particular area where the state mainly concentrated its objections concerning the stipulations. Accordingly, the panel is revising the opinion so that it now demonstrates that the findings and conclusions are amply supported, without any reference to the stipulations. To accomplish this the panel is ordering the filing of substitute pages within our opinion.[1] With such modification, the petition for rehearing of the defendants-

[1]We are directing the Clerk of the court hereby to file substitute pages 29 and 42 through 51 to our earlier opinion filed September 25, 1980.

appellants is denied by the panel, the remainder of the contentions therein having also been considered and having been found to lack merit.

The panel has also considered the motion to supplement the record and the motion that the mandate issue forthwith, and said motions are denied. The mandate shall issue in the regular time provided by Rule 41(a), F.R.A.P.

With respect to the bill of costs, it is ordered by the majority of the panel that the plaintiffs-appellees be awarded 75% of the costs borne by the plaintiffs-appellees for their briefs and reproduction of the appendix, for which the clerk of this court is directed to make an entry in the mandate. Judge Barrett would require that the costs should be shared equally by the parties.

It is further ordered by the panel that the petition for rehearing of the plaintiffs-appellees is denied. The petition for the plaintiffs-appellees for rehearing being thus denied by the panel to whom the case was argued and submitted, and no member of the panel or judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, F.R.A.P., the suggestion of the plaintiffs-appellees for rehearing en banc is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

Fidel RAMOS, David Lee Anderson, Sadiki Lisimba Ajamu (a/k/a Eugene Collins), Alexander Roses, Mark J. Menchetti and Lester Lazenby et al., Plaintiffs,

v.

Richard D. LAMM, Allen L. Ault, John Perko, Edgar Fox and William Wilson, Defendants.

NO. 77-K-1093.

United States District Court,
D. Colorado.

Dec. 20, 1979.

As Amended Dec. 26, 1979.

On Motion for Stay of Execution
Feb. 21, 1980.

In a civil rights class action challenging conditions of confinement at the maximum security unit of the Colorado State Penitentiary at Canon City, the District Court, Kane, J., held that: (1) the evidence showed that plaintiffs are housed under conditions which fall below all recognized constitutional and professional standards; those conditions include insufficient living space with inadequate sanitation, ventilation, light, heat control and fire safety; lack of protection from violence; massive and pervasive idleness because of lack productive activity; inadequate medical care, both mental and physical; and un-

necessarily restrictive classification of prisoners into security classifictions that exacerbate physical and mental deterioration, and (2) although, due to the pervasive and frequent violations of federally protected rights of inmates, the Canon Correctional Facility was conditionally ordered, closed, defendant prison officials could obtain relief from that order of closure by taking immediate steps to provide plaintiff class with the basic human needcs discussed in the opinion, taking cognizance of these principles; productive activity, motility, health, integrity and safety, and coherence.

Order accordingly.

James E. Hartley and Hugh Q. Gottschalk, ACLU Foundation of Colorado, Inc., Denver, Colo., Peggy A. Wiesenberg and Ralph I. Knowles, Jr., The Nat. Prison Project, Washington, D.C., Dudley P. Spiller, Jr., Denver Colo., The Colorado Coalition of Legal Services Programs, for plaintiffs.

J.D. MacFarlane, Atty. Gen., Joseph N. de Raismes, First Asst., Atty. Gen., Richard H. Goldberg, Jeffrey Weingman,and Maureen E. Phelan, Dennis Sousa, Henry L. Solano, Asst. Attys. Gen., Denver, Colo., for defendants.

MEMORANDUM OPINION AND ORDER

KANE, District Judge.

This action is a suit under 42 U.S.C. 1983[1] challenging conditions of confinement at the maximum security unit of the Colorado State Penitentiary at Canon City, Colorado. Plaintiffs are persons incarcerated in this maximum security unit, and defendants, include the governor of Colorado, the executive director of the Department of Corrections and the superintendent of the maximum security unit. The suit was filed *in forma pauperis* on November 30, 1977. After appearance of counsel for plaintiffs and amendment of their complaint, the suit was certified as a class action on March 31, 1978, pursuant to F.R.Civ.P. Rule 23. The class consists of all persons who are now or in the future may be incarcerated in the maximum security unit, or the new maximum or close security unit, of the Colorado Department of Corrections.

On May 17, 1978, a motion to dismiss, or in the alternative to abstain, was denied, and defendants answered the amended complaint on June 9, 1978. After a year and a half of discovery and months of efforts to reach a settlement, the pretrial order was filed. On October 5, 1979, the eleventh hour before trial, the Honorable Richard D. Lamm, Governor of Colorado, filed a letter with the

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[1]This statute was passed by Congress on April 20, 1871 and provides as follows:

> "Every person who, under color of statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Jurisdiction is provided at 28 U.S.C. § 1343(3).

Court concerning the parties' efforts to reach a settlement. In the letter Governor Lamm detailed the unsuccessful efforts made to bring the various constituencies of the state government into consensus and requested an additional one week's continuance of the trial date in order to further these efforts. The request was granted. In part of his letter, Governor Lamm stated, "I understand that the parties must prepare for trial, but it is my earnest hope that a consensus can be reached before trial, one way or another. I believe that an agreement negotiated by the parties in good faith in this matter should be given a chance to succeed, which it can if there is a legislative consensus in support of it. But I cannot agree to the document which I have reviewed absent such a consensus, and I do not believe that it would be in the interest of the court or the parties for me to do so." Trial began on October 15, 1979 and lasted for five weeks. Testimony from inmates, state officials and numerous experts was received. Thousands of pages of documentary evidence were received, and a firsthand inspection of the prison was made. After eight hours of final arguments a bench ruling was made in favor of plaintiffs holding that the conditions at the Canon Correctional Facility deprive persons incarcerated there of rights clearly protected by the United States Constitution and violate numerous rules of state law. This opinion supplants the bench ruling.

THE CONTEXT OF JUDICIAL DETERMINATION

Across the country, civil rights cases filed by state prisoners in federal courts have increased from 2,030 in 1970 to 11,195 in 1979, an increase of 451.5 per cent. Administrative Office of the United States Courts, 1979 Annual Report of the Director 59-62 (1979).[2] In the District

[2]For a study of state prisoner civil rights actions, *see* Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts, 92 Harv.L.Rev. 610 (1979).

of Colorado, for the twelve month period ending June 30, 1979, 155 civil rights cases were commenced by state prisoners, compared to 106 in 1978, 51 in 1977, and only 21 in 1976[3] This represents an increase of 50 per cent since 1978 and almost 750 percent since 1970. As of June 30, 1979, 115 such cases were pending in this district, compared to only 65 as of the same time in 1978.[4]

From the Colorado State Penitentiary alone, 150 civil rights cases have been filed since 1976. Of these 150, 84 were dismissed and two others were decided in favor of defendant state officials.[5] In comparison, in only four cases was there any disposition, preliminary or otherwise, in favor of plaintiff inmates. Two cases are on appeal, nine have been stayed or consolidated with this action, 39 others are pending, and ten have had assorted histories. Of the 92 case dispositions, 86 were either dismissed or decided in favor of state officials, accounting for more than 93 per cent of the results. Such a history hardly indicates that the federal judiciary has jumped at the chance to intepose itself between Colorado officials and persons confined at the State penitentiary. The contrary is true.

A great deal of this deference to state officials has been due to the substantial reluctance of federal courts to intervene in matters of prison administration. For many years, the so-called "hands off" policy was a near absolute jurisdictional bar to federal court review of alleged viola-

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[3]Administrative Office of the United States Courts, 1979, 1978, 1977 and 1976 Annual Reports of the Director.

[4]1979 and 1978 Annual Reports, at A-23 and A-25, respectively.

[5]Nationwide, of the 10,301 state prisoner civil rights actions disposed of during the twelve month period ending June 30, 1979, 9,526, or 92.47 per cent, were disposed of before pretrial, and only 358, or 3.47 per cent, went to trial. 1979 Annual Report, at A-30 – A-31.

tions of prisoners' asserted constitutional rights. Language from the Tenth Circuit is suggestive of the attitude that "[c]ourts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations." *Banning v. Looney,* 213 F.2d 771, 771 (10th Cir. 1954), *cert. denied,* 348 U.S. 850, 75 S.Ct. 84, 99 L.Ed. 677 (1954). *See Stroud v. Swope,* 187 F.2d 850, 851 (9th Cir. 1951), *cert. denied,* 342 U.S. 829, 72 S.Ct. 53, 96 L.Ed. 627 (1951); *Garcia v. Steel,* 193 F.3d 276, 278 (8th Cir. 1951); and *Dayton v. Hunter,* 176 F.2d 108, 109 (10th Cir. 1949), *cert. denied,* 338 U.S. 888, 70 S.Ct. 184, 94 L.Ed. 545 (1950).[6] With Cooper v. Pate, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed.2d 1030 (1964) (per curiam), however, the courts began to open their door to prisoner complaints. In *Cooper,* a state prisoner alleged that he was denied religious freedom and discriminated against in his religious practice. The Seventh Circuit affirmed the district court's dismissal:

> 'We think that it is well settled that it is not the function of the courts to superintend the treatment and discipline of prisoners in pentientiaries, but only to deliver from imprisonment those who are illegally confined.' *Stroud v. Swope, Warden, 9 Cir., 187 F.2d. 850, 851. A prisoner may not approve of prison rules and regulations, but under all ordinary circumstances that is no basis for coming into a federal court seeking relief even though he may claim that the restrictions placed upon his activities are in violation of his constitutional rights. [Citations omitted.]*

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[6]For a history and discussion of the "hands off" doctrine, *see* Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts,* 72 Yale L.J. 506 (1963); Comment, *Constitutional Rights of Prisoners: The Developing Law,* 110 U.Pa.L. Rev. 985 (1962).

324 F.2d 165 (7th Cir. 1963) (quoting United States ex rel. Morris v. Radio Station WENR, 209 F.2d 105, 107 (7th Cir. 1953)). On certiorari, the Supreme Court reversed. "Taking as true the allegations of the complaint, as they must be on a motion to dismiss, the complaint stated a cause of action and it was error to dismiss it." *Cooper v. Pate,* 378 U.S. at 546, 84 S.Ct. at 1734.

By 1972, the Supreme court said in *Cruz v. Beto,* 405 U.S. 319, 321-22 92 S.Ct. 1079, 1081, 31 L.Ed.2d (1972) (per curiam):

> Federal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons', including prisoners. We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations. But persons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes 'access of prisoners to the courts for the purpose of presenting their complaints.' *Johnson v. Avery,* 393 U.S. 483, 485, 89 S.Ct. 747 [749] 21 L.Ed.2d 718 [721]; *Ex parte Hull,* 312 U.S. 546, 549, 61 S.Ct. 640, 641, 85 L.Ed. 1034 [1035].

The court reversed the lower courts' dismissal and granted petitioner's motion for leave to proceed *in forma pauperis.*

The Tenth Circuit followed suit in *Bethea v. Crouse,* 417 F.2d 504 (10th Cir. 1969). Discussing its past dealings with prisoner complaints, the Court of Appeals stated at 505-06 (emphasis added):

> We have consistently adhered to the so-called "hands off" policy in matters of prison ad-

> ministration according to which we have said that the basic responsibility for the control and management of penal institutions, including the discipline, treatment, and care of those confined, lies with the responsible administrative agency and is not subject to judicial review unless exercised in such a manner as to constitute clear abuse or caprice upon the part of prison officials. See *Graham v. Willingham*, 384 F.2d 367 (10th Cir. 1967). Also see *Banning v. Looney*, 213 F.2d 771 (10th Cir. 1949). *But being fully cognizant that one does not lose all his constitutional rights when he enters a prison, see Cooper v. Pate*, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed.2d 1030 . . ., *we have never turned a deaf ear to a bona fide claim for relief based upon the deprivation of a constitutional right when asserted by a federal or state prisoner, either in the nature of a mandamus or habeas corpus proceeding, or, as here, a claim under the Civil Rights Act.*

Accord, Gregory v. Wyse, 512 F.2d 378, 381 (J10th Cir. 1975), *Dearman v. Woodson*, 429 F.2d 1288, 1290 (10th Cir. 1970). In *Crouse*, inmates at the Kansas State Penitentiary complained, *inter alia*, that prison officials had stood by and not intervened when plaintiffs were assaulted by another inmate. The district court had granted summary judgement in favor of the warden, and the court of appeals reversed, finding that summary judgment was not appropriate. 417 F.2d at 507-10.

Defendants have pointed to several recent Supreme Court decisions which reiterate the policy of substantial deference to prison officials. *See Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); *Jones v. North Carolina Prisoners' Union, Inc.*, 433 U.S. 119, 97 S.Ct.

2532, 53 L.Ed.2d 629 (1977); and *Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974). I have read these decisions and, to the extent that they are relevant, I am bound by them. In fact, I have consistently followed this policy. *See Jackson v. Moore,* 471 F. Supp. 1068 (D.Colo. 1979); *Marioneaux v. Colorado State Penitentiary,* 465 F.Supp. 1245 (D.Colo.1979); *Tuggle v. Evans*, 457 F.Supp. 1015 (D.Colo.1978); *Mingo v. Paterson,* 455 F.Supp. 1358 (D.Colo.1978); *Sorenson v. Zapien,* 455 F.Supp. 1207 (D.Colo.1978); and *Brown v. McGowen*, 445 F.Supp. 468 (D.Colo.1978). But it is always the countervailing principle, in these decisions and others, that "a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Procunier v. Martinez*, 416 U.S. at 405-06, 94 S.Ct. at 1807-1808. As the Tenth Circuit said in *Battle v. Anderson,* 564 F.2d 388, 392-93 (10th Cir. 1977):

> We, too, abhor any situation or circumstances requiring the intervention of the federal courts in matters involving the administration, control and maintenance by the soverign states of their penal systems. It is a delicate role assigned to the federal courts to display that restraint so necessary 'in the maintenance of proper federal-state relations.' *Townsend v. Sain,* 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). We are cognizant of the complexity of problems confronting the states in upgrading not only a host of state institutions and facilities but in properly maintaining them both physically and with adequate personnel. If we were to close our eyes to the financial burdens

a variety of 'piecemeal' federal court orders would impose upon the states and their taxpayers we would refuse to come to grips with reality. We are in sympathy with the ever increasing budgetary demands upon state taxpayers. There are constitutional and statutory limits on a state's capacity to finance capital outlays. No one state governmental body is authorized to dictate a specific course of action. The governmental wheels often turn slowly as a result of pressure generated by a multitude of needs. Those charged with the administration of state government must pick and choose, set priorities and goals, many of which must later be abandoned or delayed because of unforeseen emergencies. Thus, it is in recognition of these problems and pressures that this court is sincerely reluctant to enter the arena involving the issues presented. The fact is, however, that the *issues* are jurisdictionally before us, just as they they were jurisdictionally before the District Court. They have not been invited or solicited. *We are guided by the fact that the United States Supreme Court has not wavered in its holding that the Eighth Amendment to the United States Constitution prohibiting the imposition of cruel and unusual punishment is, inter alia, intended to protect and safeguard a prison inmate from an environment where degeneration is probable and self-improvement unlikely because of the conditions existing which inflict needless suffering, whether physical or mental. Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). [Emphasis added.]

[1] As I have stated in my bench ruling, there is, from the beginning of my assignment to this case to the present

time, a complete and utter distaste for having to cross that Rubicon which separates the federal government from the state government. In addition to the cited decisions, the history which I have recounted shows that this circuit and district have shown great deference to prison officials, especially toward the Colorado State Penitentiary and the 150 cases that have been filed from there in the past three years. Nevertheless, the plaintiffs have presented substantial, often compelling, evidence of long existing and continuing constitutional violations. Except in fashioning the necessary relief, deference is no longer possible.

JURISDICTION

[2] It is a well-settled rule that civil rights plaintiffs are not required to exhaust state remedies before seeking relief in federal court. *See Wilwording v. Swenson,* 404 U.S. 249, 92 S.Ct. 407, 30 L.Ed.2d 418 (1971) (per curiam); *King v. Smith,* 392 U.S. 309, 88 S.Ct. 2128 20 L.Ed.2d 1118 (1968); *Houghton v. Shafer,* 392 U.S. 639, 88 S.Ct. 2119, 20 L.Ed.2d 1319 (1968) (per curiam); *Damico v. California,* 389 U.S. 416, 88 S.Ct. 526, 19 L.Ed.2d 647 (1967) (per curiam); *McNeese v. Board of Education,* 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963); *Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Accord, Clappier v. Flynn,* 605 F.2d 519, 528 (10th Cir. 1979). *Wilwording* is particularly relevant since in that case state prisoners complained of conditions of confinement in the maximum security unit of the Missouri State Penitentiary. The complaint was fashioned as a petition for habeas corpus and both the district court and both the district court and the Eighth Circuit dismissed the petition for failure to exhaust state remedies. 404 U.SA. at 249, 92 S.Ct. 407. After stating that "[s]ection 2254 does not erect

insuperable or successive barriers to the invocation of federal habeas corpus," *id.* at 250, 92 S.Ct. at 408, the court said that the prisoners' *pro se* complaint could "also be read to plead causes of action under the Civil Rights Act." *Id.* at 251, 92 S.Ct. at 409. The court continued:

> Petitioners were therefore entitled to have their actions treated as claims for relief under the Civil Rights Acts, not subject, on the basis of their allegations, to exhaustion requirements. The remedy provided by these Acts 'is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.' *Monroe v. Pape,* 365 U.S. 167, 183, 81 S.Ct. 473, 482, 5 L.Ed.2d 492 [503] (1961); *McNeese v. Board of Education,* 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963); *Damico v. California,* 389 U.S. 416, 88 S.Ct. 526, 19 L.Ed.2d 647 (1967). State prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs.*Houghton v. Shafer, 392 U.S. 639, 88 S.Ct. 2119, 20 L.Ed.2d 1319 (1968).*

The rule is applicable here.[7]

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[7]Several lower courts have attempted to establish an exhaustion requirement in prisoner civil rights litigation but have been reversed by the courts of appeal. *See McCray v. Burrell,* 367 F.Supp. 1191 (D.Md. 1973), *rev'd,* 516 F.2d 357 (4th Cir. 1975), *cert. dismissed as improvidently granted,* 426 U.S. 471, 96S.Ct. 2640, 48 L.Ed.2d 788 (1976) (per curiam); *Hardwick v. Ault,* 517 F.2d 295 (5th Cir. 1975). *McCray* provided the Supreme Court with an express opportunity to require that state prisoners exhaust state remedies before seeking federal civil rights relief, but the court dismissed its writ of certiorari as improvidently granted, 426 U.S. at 471, 96 S.Ct. 2640, after the issue had been briefed and argue on its merits. Four members of the court nonetheless expressed agreement with the Fourth Circuit's decision that exhaustion is not required. *Id.* at 471-75, 96 S.Ct. 2640.

FINDINGS OF FACT

In Appendix I (Revised) to the pre-Trial Orders there are 1,727 separate, numbered paragraphs containing stipulations and proposed stipulations of fact, excerpts of sworn testimony and summaries of statistics. Some of these paragraphs contain subheadings and, in their entirety, the data covers 229 pages. During trial, thrity-six additional witnesses were called and testified. Over four hundred exhibits were received. It would be pointless to set forth all of this evidence in detail. With only two obvious exceptions, the testimony was credible and largely uncontradicted.

[3] As will be stated more explicitly, the evidence in this case shows that prisoners in the Canon Correctional Facility are housed under conditions which fall below all recognized constitutional and professional standards. Those conditions include insufficient living space with inadequate sanitation, ventilation, light, heat, noise control and fire safety; lack of protection from violence; massive and pervasive idleness because of lack of productive activity; inadequate medical care (both mental and physical); and unnecessarily restrictive classification of prisoners into security classifications which exacerbate physical and mental deterioration.

The old maximum security prison of Colorado ("Old Max") began as a territorial prison back in the late 1860's before Colorado became a state. For the most part, Old Max was built in the early part of this century. With the exception of the new administration building, the prison is antiquated and shows scars left by generations of neglect.

Every report which has been issued in the last ten years has decried the inadequate facilities and sporadic

rehabilitation at Old Max. The institution has been studied to death.

In 1973, a task force from the American Correctional Association found that old Max was an "outdated, unmanageable facility'; which could not be efficiently staffed due to its design. A year and a half later, the report by the Attorney General to defendant Lamm on the events and causes of the May 18, 1975 riot found that Old Max was "antiquated" and "insecure" and recommended studying the possibility of razing the cellhouses or gutting their interiors in their entirety. In February 1977, the Corrections Master Plan which was submitted to defendant Lamm and the Colorado State Legislature recommended that Old Max be phased out as a prison. Its use as a medium security prison was considered and rejected.

In February, 1978, the Department of Corrections commissioned yet another master plan. A consultant familiar with reuse and modification of existing correctional facilities, whom the Department of Corrections hired to study Old Max, found that with the exception of the new administrative building, all other facilities at Old Max, including the perimeter wall should be demolished or otherwise decommissioned so that inmates will not be housed or employed in those buildings. At the time of this study, the Department of Corrections supported demolition of all buildings at Old Max except the administration building. Paul Silver, a nationally recognized corrections architect hired by the defendants, has stated that each and every major living area at Old Max is unfit for human habitation.

Although Colorado has appropriated funds to build a new maximum security prison and a new close security prison, these facilities are not scheduled to be opened until

January or February 1981. In the interim, prisoners are forced to live in intolerable conditions at Old Max.

Old Max was built over the years in a random fashion on a site stepping up a steep "hogback" hill at the west end of Canon City. Buildings, fences, walls and towers have been added over the years without an overall plan for development.

Due to its haphazard evolution, Old Max is a collection of unmanageable and unsecurable building components. A relatively new administration building and diagnostic center front the public road and form the outer facade of the prison. Behind the walls, the prison consists of three large cellblocks – 1, 3, and 7. The central building which houses the school, auditorium, law library, main kitchen, dining rooms, and a few offices is part of the same building that houses cellhouse 1. The prison infirmary which serves all 3 prisons in Canon City is located deep within the Old Max complex near cellhouse 3. In the basement of the infirmary there is a small housing unit known as cellhouse 5 for "trusty" prisoners; upstairs is a clutch of carrels for the tiny and wholly inadequate mental health department. Beyond the North Wall is a small industry row. Outside the walls on the east side of the prison is a small obsolete building known as cellhouse 4 which originally was used as the Colorado Women's prison and is now used to house minimum security prisoners assigned to Old Max.

The main living areas of Old Max are unfit for human habitation. Housing facilities are totally obsolete and do not comply with minimal architectural standards. Cellhouses 1 and 7 house approximately 800 prisoners in high multi-storied open tiers. Each cellhouse consists of 2 concrete cellblocks, with 4 tiers of cells back to back in 2

parallel rows with an open gallery between them. There is no room for prisoners to move. Most cells provide for barely one half the square footage of space required by modern correctional standards.[8] Tiers are narrow and floor space is limited. As a result, prisoners live with constant jostling in very restricted space.

At one point, Colorado planned to tear down cellhouse 7. As recently as 1975, it was closed. However, after the May 1975 riot, cellhouse 7 was reopened so prisoners could escape the overcrowded conditions which existed in cellhouse 1.[9] Now the population in those cellhouses has increased.

Cellhouse 3 consists of 100 segregation cells in a concrete building with 10 separate wings for prisoners. It has two floors. Each floor has 2 wings of interior cells back to back. In addition, cellhouse 3 has 6 maximum isolation cells known as "the hole" on the bottom floor behind the officer control cage and a similar wing upstairs for death row. There is a special section on the second floor known to the staff as "intensive management unit" and to the prisoners as the "dog cages." Both terms are accurate. Prisoners in cellhouse 3 are locked in their cells an average of 23 hours a day. The cells do not provide the 80 square feet required for prisoners in segregated status by the American Coorection Association or the 60 square feet accepted by *Battle v. Anderson.*

Environmentally Old Max is inadequate to meet the health and safety needs of prisoners in the correctional

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[8]In cellhouse 7, most cells are 31.5 square feet. In cellhouse 1, cells are 35 square feet.

[9]In May of 1975, the population in cellhouse 1 was 357 and the Attorney General's Investigation found that prisoners, line officers and administrators all agreed that it had to be drastically reduced.

system. Buildings are in a serious state of disrepair. The roof in cellhouse 1 has been leaking in the south, north and front sections for several months. Previous repairs were ineffective. The roof in cellhouse 3 is deteriorated and has also been leaking over a major portion of the cellhouse.

Plumbing throughout Old Max is unsanitary, inadequate and poses an imminent danger to public health. Cellhouse 3 does not have hot water, even though minimum standards for correctional institutions require hot water as a fundamental health measure. Cellhouse 1 and 7 cells now have hot water.

Throughout the institution, there are leaking water pipes. In cellhouse 7, continuing problems with leaking plumbing have caused leaks into adjacent and lower cells. Moreover, malfunctioning toilets and deficient venting of the plumbing system have caused sewage to drain into sinks in adjacent and lower cells.

Shower areas have not been maintained in clean, sanitary and safe condition. Bath water has been impounded in shower drains and troughs due to obstructed drains. Excessive moisture, humidity and overgrowths of mold, fungus and slime have resulted from inadequate ventilation. Missing ceramic floor tiles have made floors uncleanable and promote mold and slim buildup. The unsanitary conditions present a source of infection from fungal buildup and a hazard to users due to metal stubs sticking up through the floor and uncovered electrical boxes that are sources for electrical shock. In cellhouse 3, one inmate was burned on the arms, hands, neck back and face by being exposed to excessively hot water in the shower; his injuries required plastic surgery.

The heating and ventilation system are antiquated and

incapable of providing minimally adequate heat and ventilation. Cellhouses 1 and 7 have open 5-6 story interiors with two four-tier islands of cells surrounded by glass windows around the entire building perimeter. This design precludes the elimination of drafts, the adequate control of temperatures, and the even circulation of air. State health inspections have consistently cited extreme temperature variations between the first and fourth tiers. Ventilation equipment is frequently not in use. During the summer months, odors, excessive heat, and humidity are unbearable on the upper tiers. The lack of adequate ventilation causes stagnant air with foul odors; the continued presence of contaminants in the air; a lack of adequate displacement of body heat; personal discomfort; health and sanitary problems and an increase in frustration, stress and hostility among prisoners and staff. The ventilations systems in cellhouses 1, 3 and 7 cannot be upgraded to meet minimum standards without major alterations of the ventilation systems and buildings at uneconomical expense.

The noise levels in the living areas of Old Max are intolerable. Large and old cellblocks with large vaulted spaces, tremendous physical distances, open tiers, hard surfaces, and an absence of acoustical equipment create serious and harmful noise level problems. There is a direct correlation between high noise levels and high blood pressure, hypertension, nervousness, stress, loss of appetite and detrimental pyschological effect. No measures have been taken to control or abate noise in any area of Old Max.

Lighting is inadequate for prisoners to read safely in their cells. Minimum standards require 30 foot candles; ordinary lighting for book reading should be 60-80 foot candles by architectural standards. Readings at Old Max

for March, June and July 1979 showed lighting was only 10 foot candles. The cell lights by design are inadequate and impracticable for lighting purposes involving close eye tasks. Inadequate lighting has adverse effects on vision; moreover, insufficient lighting increases tension and fatigue among prisoners and guards.

The entire institution is a fire hazard. In the event of fire in old multi-tiered facilities like cellhouses 1 and 7, it is impossible to evacuate prisoners. Cellblocks are not divided into compartmentalized fire zones. There are neither smoke barriers nor smoke detectors. Twenty-four hour surveillance by guards is relied upon for fire detection, and fire fighting. Even the hospital has dead end corridors which present serious barriers to evacuation in case of emergency. The institution has been cited for numerous violations of the National Fire Protection Association Standards.

Conditions in the food services areas at Old Max and the Diagnostic Unit fail to meet any known public health standards. The building housing the main kitchen is obsolete; in October 1978 the Department of Corrections determined that major structural improvements were not economically feasible. Walls are soiled with dirt. The wall tile throughout the main kitchen is not readily cleanable because of recessed grouting. Concrete floor areas have deteriorated and are not readily cleanable. Ventilation is inadequate throughout the main kitchen. The fan in the kitchen is ineffective and causes dust and lint to be blown over the food preparation area. Two barely functioning floor drains serve the entire kitchen. Excessive water collects around steam kettles, dishwashers, and the produce processing area. Storage shelves have been soiled with dirt. Rodent droppings have been found in the storeroom. Equipment is outdated and poorly arranged.

Inspections by the Colorado State Health Department have revealed persistent violations of health codes. As of July 17, 1979, the State Department of Health could not issue a Certificate of Inspection for the food service facilities because the facilities were not in substantial compliance with the "Rules and Regulations Governing the Sanitation of Food Service Establishments in the State of Colorado." Although some deficiencies were clearly laid to the outdated equipment and facilities, most deficiencies were caused by a lack of routine maintenance, operational and cleaning procedures. These unsanitary conditions have a direct impact on the health of the inmate population.

Many health and sanitation deficiencies at Old Max are the result of a lack of routine maintenance and cleaning programs. The present executive director, James Ricketts, is a professed stickler for cleanliness. Under his administration, a significant increase in cleaning activity has taken place but the facilities are still below standard. Poor housekeeping practices have been prevalent throughout the institution. Inspection after inspection cites cellhouses, corridors, and cells that are littered with trash and an accumulation of decayed food and other materials. As of July 1979, general repair and maintenance work at the prison was not being handled in a prompt and responsive manner by the industries division thus resulting in delays in repairs to plumbing, lighting and electrical systems.

Every expert who has examined Old Max has concluded that it would be both infeasible and uneconomical to renovate Old Max for continued use. Defendant, former Executive Director Ault, has stated that many health and safety deficiencies at Old max are virtually impossible to correct because of inherently deficient design and construction. As of February 1, 1977, it would have cost at

least 38 million dollars to make Old Max minimally habitable. Even if defendants were to upgrade individual buildings to minimize environmental health deficiencies, the design and layout of Old Max make it virtually impossible for officials to provide prisoners with adequate programming.

There is inadequate space at Old Max for programs and what space is provided is poorly designed. In order to prevent debilitation of prisoners, housing units must include adequate space for outdoor recreation, indoor recreation, lounge space and private activity spaces. Yet none of the major housing units at Old Max have day rooms, activity space or private conference areas. The random layout of buildings limits spaces available for programmed recreation. Moreover, the mazelike design and disorganized layout of the prison dictate a disproportionate amount of staff time to security and monitoring traffic. Staff are not available to oversee programs and activities. Former Director Ault recognized that the limitations of the 100 year old prison would make it difficult for the Department of Corrections to implement Colorado laws which require all inmates to work.

The most serious defect in the design of Old Max ,however, is the inherent inability to provide prisoners with basic safety. The American Correctional Association report, the Attorney General's report, the 1977 Master Plan and the Five Year Correctional Plan all found that the design of the prison makes it virtually impossible to provide prisoners with security. The haphazard growth of the institution and the nature of the site do not permit adequate surveillance.

Due to inadequate planning and design, the prison cannot be staffed efficiently to provide for security. So many

walls and fences have been constructed within the perimeter of Old Max, it takes a disproportionate amount of staff to man the security towers; it is necessary to man 10 towers around the clock, to provide what is less than adequate surveillance. Because buildings, yards and walls have developed in a random fashion, inmate traffic around the prison is congested and confused. Moreover, there are a large number of blind spots which permit assaults and violent incidents to occur out of the sight of correctional officers. There are so many niches and crannies which are hidden from visibility at Old Max that officials have restricted prisoner movement and the use of outdoor space.

The cellhouses do not provide for safety. Housing contributes to violence between inmates often leading to severe injury and death. The design of cellhouses 1 and 7 fails to provide for visibility. The guards' cage at the far end of the cellhouse is inadequate for surveillance. There is no secure vantage point from which cell movement can be observed. Visual surveillance of the upper tier cells and most of the tiers is obstructed from the ground floor. Similarly, cellhouse 3 has 10 separate wings for housing prisoners. This design does not allow for visual surveillance and observation from the central control cage.

Old Max fails to meet life safety codes, building codes, health codes, fire safety codes, or other regulations relating to the safety of inmates and staff.

IDLENESS

Old Max is characterized by massive and pervasive idleness. Although the defendants have been aware of the problem of idleness for years, nothing has been done to alleviate the dead time and boredom which dominate the

lives of most prisoners at Old Max. In recent years, actions have been taken to restrict rather than to increase activity at the prison. No substantial effort has been made to increase jobs or programs or activities at Old Max nor are there any developed plans or funds for jobs, programs, activities or staff at the new prisons.

In 1973, the American Correctional Association found that idleness was responsible for more problems at Old Max than any other factor. Similarly, the report of the Attorney General on the events and causes of the May 18, 1975 riot at the Colorado State Penitentiary concluded that "there is too much 'dead' time during which inmates have no effective opportunity to engage in productive activity," and that "more work and recreation programs are needed."

While fully cognizant of these reports, prison officials began to restrict productive activity at Old Max. After 1975, officials tore down a substantital portion of industry row along the north wall eliminating the cannery, mattress factory, brick plant, shoe shop, butcher shop, tin shop, garbage shop, soap plant, blacksmith shop and tailor shop. For totally unexplained reasons, inmates do not even remove trash and garbage. Such removal is performed by an outside contractor. In 1977, after Allen Ault became Director, officials tore down the laundry which employed over 50 prisoners. In 1977, the officials tore down the general library and stopped providing any library services or books to prisoners. In 1975, the Warden of Old Max, after consultation with Governor Lamm, discontinued a number of inmate self-help groups at Old Max, including the Black Cultural Development Society, the Latin American Development Society, the Progressors, each of whose membership ranged from 100-200 prisoners. In 1977, officials discontinued the Alcoholics

Anonymous Study Group which involved 234 prisoners. Later, the officials banned the inmate council and discontinued the inmate radio station and the inmate newspaper. None of these jobs or activities has been reinstated or replaced.

The majority of prisoners at Old Max are unemployed. Such unemployed inmates in the general population are referred to as "transitional workers" or "TWs." These prisoners are eligible for jobs but are not assigned only because there are no jobs available. Even though TWs are not so assigned for disciplinary violations, they are forced to remain in their cells at least 20 hours a day. Not only are they denied employment opportunities, but because they are not workers, they are denied access to any constructive or productive activities such as hobbies or crafts and drug and alcohol treatment groups. Essentially, they are subject to double punishment because no jobs are provided.

Over a hundred prisoners at Old Max are confined in protective custody to escape the violent and unsafe conditions in the general population. They are there for their own safety, not because of misconduct. Even so, they are locked in their cells for at least 20 hours a day, and allowed to leave only for meals and showers, and for recreation twice a week. Prison rules deny them the opportunity to participate in employment, education, drug treatment programs, hobby activities and religious programs. In recent months they have had to forego one of the opportunities for recreation in order to go to the canteen.

One of the nation's leading experts in the field of corrections, John P. Conrad, testified that an excessive number of prisoners in protective custody is an indication of improper administration and inadequate staff. There is no legitimate penological reason for denying these inmates

access to jobs and other constructive activity. The only reason for their forced idleness is that there is an inadequate staff to provide protection outside the cells. That so many inmates are willing to endure these conditions is an indication of the level of concern for personal safety.

In short, many prisoners at Old Max are locked in their cells for more than 20 hours a day. Largely because of inadequate resources, prison rules and regulations severely restrict the opportunity of many inmates to participate in the few programs which do exist. The result is clear: only a small number of inmates are involved in programs and the rest spend their days confined in their cells with nothing constructive to do.

ISOLATION

A large number of prisoners are subjected to long term isolation under oppressive conditions of confinement. In cellhouse 3, prisoners are locked in their cells for more than 22 hours a day. They are not let out of their cells for daily showers or daily exercise. They are prohibited from participation in all programs. They are not allowed out of their cells for meals. Inmates in cellhouse 3 are denied the most rudimentary opportunity for human contact: treatment staff rarely come to cellhouse 3 and the three guards who are assigned to the cellblock rarely enter the cellblock areas to talk to prisoners.

Many prisoners are placed in cellhouse 3 for administrative reasons, not for punishment. Nonetheless, all prisoners in cellhouse 3, even those who are there because of serious mental problems, are treated in the same harsh and restrictive manner as those who are being punished. While punitive segregation is limited to specific lengths of time, administrative segregation is not. The total lack of

activity in cellhouse 3 increases frustration and stress and causes mental and physical deterioration.

Defendants have done little or nothing to reduce the large numbers of prisoners in administrative segregation or to create opportunities for constructive activity. In fact, the number of inmates in administrative segregation has increased to the point that a second unit has been created in cellhouse 7.

EMPLOYMENT

The state of Colorado has placed a clear statutory duty on the defendants to "assume[] responsibility for training offenders in general work habits, work skills, and specific training skills that increase their employment prospects when released," to "[d]evelop industries that provide forty hours of work activity each week for all able-bodied offenders," and to "[p]rovide an environment for the operation of correctional industries that closely resembles the environment for the business operations of a private corporate entity." C.R.S., § 17-24-102(1)(a), (b), (c), (d) (1978).

Despite this duty, the majority of prisoners at Old Max do not participate in work and training programs. On July 1, 1978, less than ¼ of the prisoners at Old Max (206 out of 847 prisoners) were assigned to jobs. As of June 4, 1979, nearly 400 prisoners were completely idle.

The industries program does not have sufficient staff to operate. Even though Old Max houses half of the prisoners who are incarcerated in the Colorado prison system, the Department has assigned only 13 of its 167 correctional industries staff to the production industries program at Old Max. Staff shortages have adversely affected prisoners in working status since staff cutbacks

have resulted in prisoners spending more idle time in their cells.

There are very few production shops at Old Max. The shops which exist – tag plant, sign shop, print shop, machine shop, carpentry/furniture shop – employ few prisoners. Other jobs are primarily maintenance, clerical and "porter" jobs which do not keep prisoners busy and do not develop job skills. Industrial shops at Old max are limited by a lack of qualified and trained personnel, old equipment which frequently breaks down, a lack of materials and a lack of stock and inventory. None of the industries shops offer journeyman or trade certificates. Not all shop supervisors are certified as vocational training instructors.

Defendants have not made any significant effort to create new industrial jobs for prisoners at Old Max. In the last three years, defendants have started only one new shop. Only two prisoners have been assigned to this shop since it opened. There is no formal follow-up to see if prisoners employed in prison industries are actually placed in private industry upon release. There is little or no systematic training oriented to employment and no indication of joint planning and program development between correctional industries, vocational education and academic education. There is no overall program of vocational education and on-the-job training which extends from the classroom through work release opportunities and parole. There is no vocational training offered.

As previously stated, prisoners who are unemployed because no jobs are available are denied opportunities to participate in other productive activities because they are not employed. Unemployed or under-employed prisoners increase security problems for the staff. Gambling,

alcohol and drug abuse, and fights fill the void created by the idleness.

Unemployment and idleness could become even worse at the new facilities. There are presently no firm plans for industry programs at New Max. The Department does not plan to move the existing tag plant, sign shop, print shop, machine/welding shop or the furniture shop to New Max. The Department intends to keep industry row at Old Max operating until the shops generate enough profit to support construction of industrial shops at New Max. However, the Department does not plan to permit prisoners at New Max or the new close security prison to be transported to Old Max to work in the interim. The Department estimates that at least a third of the prisoners at New Max will be ineligible for jobs, and that another third will be in protective custody. Jobs have not been developed for those in protective custody, although there has been some mention of possible "cottage industries" for such inmates. It has also not developed enough jobs for those prisoners at Old Max who are expected to move to the new close security prison.

EDUCATION

Department statistics indicate that 75-85% of the prisoners at the penitentiary lack a high school diploma. The average reading level of prisoners is 7th-8th grade level. Nonetheless, educational programs at Old Max are totally inadequate. Education has no priority in the Department of Corrections. The education department is most conspicuous by its absence. It suffers from lack of teachers, lack of funds, lack of space and lack of supplies. There is only one full-time civilian teacher at Old Max for a population of 800-900 prisoners. The other teacher who is assigned to the school spends little or no time teaching

prisoners. The education department has a budget of $6,000, half of which has been diverted to other departments. In early 1979, the school did not have basic supplies such as pencils, paper, chalk and textbooks.

Hardly any inmates are given the opportunity to participate in educational programs. All prisoners in cellhouses 3 and 4, and all inmates in punitive segregation, administrative segregation and protective custody are totally excluded from educational programs. Prisoners with jobs are not permitted to participate in daytime educational programs.

Even prisoners' efforts for self-improvement have been severely limited and inhibited. There are no areas for study, either in the classroom area or elsewhere within the maximum security prison; most study must take place in inmate cells under the most adverse circumstances without adequate lighting, space or quiet for reading. The prison does not provide prisoners with funds for correspondence courses. At the time this suit was commenced, there was no general library at Old Max. One is presently planned but existing books are stored in a basement. Programs to encourage use of library books are nonexistent. Even though the Colorado State Librarian has a duty to provide general library services to prisoners at Old Max, there was no provisions for a professional librarian or library services. C.R.S., § 24-90-107(1)(1) (1973). No volunteers are used anywhere in the institution.

RECREATION

Recreation programs are important because they allow prisoners to release stress and avoid deterioration. Old Max does not have a sufficient number of recreational

programs and opportunities for prisoners. Recreation programs principally consist of offender initiated athletic activities which are monitored by the recreation staff. They are clique oriented and serve to restrict the use of the gym and athletic equipment to a limited number of offenders. Non-athletic programs are almost non-existent. Access to the gym is limited. It is closed every day from 1—3 p.m. and entirely closed on Friday, Saturday and Sunday evenings.

Officials offer little in the way of programmed activities to combat boredom and idleness. The few group activities which are offered are restricted in number to 15 prisoners. In 1976, groups and community programs were open and memberships usually included from 60—100 prisoners. The only group activities offered consist of a bi-monthly discussion group for 15 prisoners every other Monday night, an Alcoholics Anonymous group for 15 prisoners on Wednesday and Friday nights, and a Narcanon group for narcotics addicts on Thursday nights. Chicano and black study classes have been discontinued, as well as the bridge and chess clubs.

PERSONAL SAFETY

In recent years, Old Max has been plagued with violence and the fear of violence. In May 1975, there was a major riot at the maximum security prison. In August 1976, in response to the loss of lives, serious injuries, strongarming, violence and drug dealing, the Chief of the Division of Correctional Services and the Superintendent of Old Max ordered a massive lockdown of the entire prison population.

In September 1976, Governor Lamm declared that "the prison has fallen under a reign of terror," and called a

special legislative session to address the situation. The legislature responded with bills making it a felony to make, possess, or bring contraband into the prison, making it a felony to assault a prison employee; increasing the penalties for escape; redefining riot offenses to include inciting, participating in, or failing to disperse from a riot; and requiring all visitors to submit to body and car searches.

The situation has not changed. In submitting the State Master Plan to Governor Lamm, Thomas Sheehan highlighted the dangerous atmosphere at Old Max stating: "[A]n environment of tension, anxiety and fear exists for both inmates and correctional staff. The result is an unsafe environment for both. Consequently, effective offender programming, including work activities, cannot occur." Recent studies have confirmed that the system is still fraught with tension and violence. In its investigation of cellhouse 3, the 1978 Interagency Crisis Committee found that:

> In the assessment of the staffing patterns of Cell House #3, it became overwhelmingly evident to the committee that staffing was grossly inadequate. The physical facility has ten individual units that should require a minimum of one person on duty per shift to maintain observation and guarantee security. In addition, there should be three individuals unasigned that coordinate communication and programming in order to handle emergency situations and anything out of the ordinary. The present staffing finds 91 inmates in ten locations managed by three employees. There is no possible way that they can maintain security.

Courts have taken judicial notice that most acts of violence go unreported in prison. *See, e.g., Pugh* v. *Locke,* 406 F.Supp. 318, 325 (M.D.Ala.1976). In general, the crime of rape at Old Max is unreported and prisoners report even fewer rapes than victims in the larger society. Even so, defendants' logs indicate an extraordinarily high amount of stabbings, assaults, fights and threats. Medical reports reflect an inordinately high number of suicide and self-mutilatory gestures. Contraband logs and shift reports reveal the excessive number of weapons officials have uncovered.

The figures reflected in defendants' records represent the tip of the iceberg. Until recently, defendants did not keep records of the number of suicides or suicide attempts at the prison. Moreover, when this law suit began, defendants claimed that there were no readily available means of obtaining data on deaths or violent assaults. *See, e.g.,* Objections to Interrogatories 18-22 (October 2, 1978). Records which reflect violence are kept in different offices. To complicate matters, record-keeping practices have changed with each turnover in administration.

Perhaps one of the most accurate barometers of the fear that pervades Old Max is the extraordinary number of prisoners who have placed themselves in "protective custody" where they are deprived of almost all activities and are locked in tiny, cramped cells for all but a few hours a day. In July 1978, 18% of the prisoners at Old Max (135 of 765) were classified as protective custody. While the number of those in protective custody has been reduced to about 100, the number of inmates requesting protection has continued to increase.

The Attorney General's report on the events and causes of the May 18, 1975 riot identified faulty architecture, in-

adequate staffing, idleness, lack of constructive activity, inadequate guard training, racial tension, and poor contraband control as some of the underlying causes of violence. No significant improvements have been made.

As has been detailed, the architecture and layout of the facility make it virtually impossible to provide security. There are innumerable blind spots which permit assaults, stabbings and rapes to occur without surveillance. The design and staffing of all the major housing units contribute immeasurably to violence between inmates, often leading to severe injury and death. Prisoners have been brutally injured in every major living unit, including the "protective custody" units. What nooks, crannies and cells are not concealed are cluttered.

Defendants have failed to maintain adequate staffing at Old Max to protect prisoners from the unsafe physical surroundings. (1977 Master Plan, p. 7.2; Ex. 2) When one considers that the prisoner population at Old Max is greater today than it was in 1975 and that staffing patterns in the housing units have not been significantly increased, it is clear that the understaffing at Old Max is even more dangerous to prisoners today than it was in 1975. In its report to Governor Lamm and Superintendent Wilson on the rash of suicides and suicide attempts, the Interagency Crisis Committee concluded that "almost everything they reviewed sooner or later related to inadequate staffing." After reviewing staffing levels, the committee found that "it became overwhelmingly evident that staffing was grossly inadequate." Although these reports recommended substantial increases in staffing, the Department of Corrections requested fewer new positions than it needed and in fact decreased security staff at the facility in fiscal year 1978-79.

Administrative turnover has contributed to the unstable

environment for corrections and the high tension among staff and prisoners. (1977 Master Plan, p. 3.19; Ex. 2) In the past seven years, there have been six different Wardens at the Penitentiary, four Directors of the Division of Corrections, and four Executive Directors of the Department. As a result, policies and practices are constantly changing, leaving prisoners and staff in a constant state of flux.

An atmosphere of tension, anxiety and fear exists for both inmates and correctional staff. Reports dating to the Civil Rights Commission Study in 1973 have stressed the need for affirmative action to help lessen the disparity in race and culture between prisoners and guards. Although there have been some improvements, evidence reveals that only 4.4% of the correctional employees in the three Canon City prisons are black and only 6.5% are Hispanic.[10] Numerous reports have criticized the rural location of the prison which makes it particularly difficult to recruit professional staff and minorities. Given the cultural differences,the need for staff training is accentuated. Yet staff personnel receive no continuing training. Initial training was only recently instituted and, while it is laudable, it is grossly inadequate. No staff training meets any known professional or occupational standards.

MEDICAL CARE

Defendants have been aware of grave and systemic deficiencies in the medical care delivery system at Old Max for years. In 1974, the state grand jury which investigated the maximum security prison found that staffing was inadequate in medical and psychological services. At that time the grand jury cautioned "this situation can no longer be

[10]30.37% of the prisoners are Hispanic and 27.50% are black.

ignored by the Colorado State Government." In 1977, the State Master Plan found that staffing, facilities and equipment in medical and mental health services were still inadequate to meet prisoners' health care needs. The prison is totally ill-equipped and unable to provide essential health services. Both in terms of physical and mental health delivery, the conditions in the penitentiary amount to an emergency situation. As one expert described the situation, it is a time bomb ready to explode into a disaster.

The infirmary at Old Max is responsible for providing medical services to all prisoners in the Canon City area including prisoners at Old Max, the medium security prison, the women's prison and the diagnostic center. Staffing is completely inadequate. The shortage in medical staff including doctors, nurses, and other support staff results in inadequate medical coverage. The primary care physician who has responsibility for the entire medical care program is paid for 3/4 time for prison services, he operates his own private practice and spends about three to five hours on-site at the prison per week on patient care. He is available for telephone consultation with staff as his personal circumstances permit. Physician asistants are acting as physician substitutes rather than as physician extenders. One physician assistant has requested more physician supervision, but his request has gone unheeded. There are no registered nurses to staff the infirmary at night. There is no ancillary staff to provide 24-hour a day, 7-day a week service. Because the medical facility is understaffed, medical personnel are continually called upon to perform services for which they have not been trained and for which they are not qualified.

Contrary to every medical expert opinion, the department uses inmate help in the medical services area. In 1977

when the law suit was filed, prisoners worked as nurses and were the sole providers of health care when civilian nurses and doctors were not present. Prisoners continue to work in such sensitive areas as the x-ray lab, the medical records department, dental services, the optometry department, physical therapy department, and the mental health department. The use of inmates in these areas violates the American Medical Association Standards for Correctional Health Care, and Colorado's own health care standards. The use of such inmates presents serious problems in that some inmates may abuse their positions for personal gain or be subject to pressure from other inmates for special favors.

A prison infirmary requires quick exists and easy access to an outside medical facility. Adequate transportation is necessary to enable inmates to have outside medical consultations with specialists. One of the most serious problems with the prison health care system is that the Department of Corrections does not provide numerous vital medical procedures on site and relies on transporting prisoners to Colorado State Hospital for treatment. There has been a serious breakdown in this system because security staff control and interfere with prisoner access to needed health care services. Over the years, reports have pointed to an ongoing conflict of interest and lack of cooperation between security and medical services. Medical decisions are not followed by security officers. Treatment is delayed and avoided. Illness or injury which could be treated successfully is neglected until near fatal conditions develop. One inmate, in otherwise excellent condition, suffered an appendicitis. After misdiagnosis and hours of delay before receiving competent attention, he was then delayed without any excuse at all, from being transported to the Colorado State Hospital. Transport was further interrupted and, upon arrival, adequate atten-

tion was not given until after the appendix ruptured and the inmate was placed in a life-threatening situation. The inmate was then transferred back to Old Max before he had adequately recovered and complications and further needless suffering ensued. Folow-up care was delayed and incompetent. Were it not for the fact that the inmate was previously in superb condition because of his training as a champion weightlifter, he might have died. It is certain that his suffering was needlessly prolonged and that the treatment he received was inexcusably delayed and inadequate.

Another inmate, through bureaucratic indifference, was forced to engage in activities expressly prohibited by a physician. Though suffering from exceedingly painful spinal disc problems and consequent surgery, he was forced to engage in lifting and other heavy manual labor. Medical aid was denied and medical prescriptions ignored. The extent of his permanent injuries resulting from this treatment remains to be determined.

Another inmate came to the institution with a serious heart condition. Instead of being placed in the infirmary for direct observation and monitoring of his condition, he was placed in one of the cellhouses. He died before receiving medical attention.

Trips to Colorado State Hospital are dependent on the availability of transportation which is controlled by security staff. There is only one motor vehicle available for transferring prisoners to CSH. Medical staff must compete with security staff. As a result, there is a serious backlog of prisoners waiting for general surgery, orthopedic surgery and for treatment by ear, nose and throat specialists. Three to four specialty clinics a week have been cancelled because Department of Corrections security staff did not provide the necessary transportation to CSH.

Moreover, arbitrary rules imposed by prison officials have prevented prisoners from obtaining prompt medical treatment. Even though five prisoners may be scheduled to go to CSH for treatment, if one of those five prisoners is classified as "maximum security," security staff will only permit one prisoner to be transported to CSH that day. As of February 1978 there was a backlog of 212 prisoners waiting for treatment at CSH specialty clinics.[11]

Inmates are entitled to reasonable dental care. Serious dental problems constitute the single most prevalent physical health problem in the institution. Dental problems cause and complicate other physical and psychological ailments. Dental staff and equipment have been insufficient to provide urgent care, though some improvements have been made in recent months. The present inmate per dentist ratio is disproportionate in comparison with other prison systems and precludes proper treatment of dental needs. There is a serious backlog of prisoners awaiting oral surgery and other dental treatment. As of June 1, 1979, neither Colorado State Hospital nor the Department of Corrections had an oral surgeon. In some cases, acute infectious dental conditions have been left untreated or have not been treated in a timely or appropriate fashion. Dental health care at Old Max is well below minimally acceptable standards for dental care, including the June 1, 1978, Draft Federal Standards for Medical Care and Health Services in Corrections, the American Medical

[11]The backlog problem has been complicated by surgical residents at CSH who pick and choose among procedures and will only do ones that interest them. Their treatment of prisoners is rude and unsympathetic. Uninteresting cases go untreated. One side effect of this is that people waiting for surgical procedures are on pain killers and are becoming addicted. Another is quite understandable hostility which predictably will erupt on some unknowing innocent person at a later time following relesae. The subsequent crime and victim will be included in the inevitable statistics used to describe recidivism.

Association Standards on Medical and health Services in Corrections, and the Colorado Dental Association Standards.

"Mental health needs are shunned and ignored as if they were an ugly stepchild of corrections." Plaintiffs' Trial Brief, at 32. A few years ago, the psychology department was abolished. Staff were reclassified as "corrections specialists" and moved over to the medical department. The Administrator of the Medical Department, however, claims "mental health" is not his responsibility. Presently, psychological services are under the Programs Manager and have been renamed the "mental health" department. The prison does not have adequate staff trained in psychology or psychiatry. The entire operating budget for the mental health department for 1978-1979 is less than $500.

In 1978, the Department reported more than 70 incidents of suicide and self-mutilation attempts. Between January 1, 1979 and May 30, 1979, the Department reported more than 21 incidents. The Department's own Five Year Plan issued in February 1978 recognized that "many, if not all of these incidents [involving self-inflicted wounds] could [have been] avoided by placing these inmates in a professionally-administered unit that does not entail the almost total sensory deprivation of cellhouse 3."

The Cannon Correctional Facility complex has been without psychiatric coverage for years. A psychiatrist from the Reformatory in Buena Vista comes to Old Max once a month or sometimes once every two months. This "coverage" is inadequate to meet minimally acceptable standards for psychiatric care. The prison has been without a Ph.D. trained psychologist since the fall of 1978. Counseling personnel who are an important adjunct

to psychological and psychiatric staff are deficient both in numbers and in qualifications. Until the middle of 1979 there were only two full-time equivalent counseling positions in the mental health department. An additional position was added during the summer, but none of these individuals are licensed as clinicians in the State of Colorado. The department has no civilian support staff. As a result, the counselors on staff spend a disproportionate amount of time on administrative and clerical work rather than treatment. The mental health department is not even considered a part of the medical department by the institution. It is under the jurisdiction of the Programs Manager.

Staffing deficiencies in the mental health department have been brought to the attention of the Department for years and have been disregarded. In February 1977, the University of Colorado Department of Preventive Medicine and Health Services conducted an on-site evaluation of health services and found critical shortages in mental health department staffing. The evaluation recommended significant staffing increases. To date, these recommendations have not been implemented.

In 1978, the mental health department at Old Max requested an additional psychologist to work with severely distrubed prisoners in cellhouse 3. The legislature approved the position, but the Department of Corrections used the money to hire a personnel officer instead.

In May 1978, Steve Bloom the former Department Director of Psychology and Diagnostic Services made a "conservative" estimate of current mental health needs of prisoners at Colorado State Penitentiary and found that there was a need for at least 12 full-time mental health clinicians who could devote 75% of their time to treatment activities as opposed to administrative training or super-

visory functions. His recommendations have not been heeded.

At best, the Department's limited mental health staff operates on a crisis intervention basis with little or no opportunity for either adequate planning or implementation of treatment programs. The mental health staff have an excessive caseload. They do not receive consistent information from the Diagnostic Unit identifying prisoners in need of psychological treatment. Even if recommended, the staff is inadequate to provide treatment to those in need. Individual and group counseling are severely restricted. Psychiatric treatment is practically nonexistent. There is a large waiting list of prisoners in need of treatment. The monitoring of the effects of psychotropic medication on individual inmates is lamentably inadequate.

The physical facilities in which mentally disturbed prisoners are housed are as inadequate as the staff available to treat them. Acutely psychotic patients, suicidal patients, patients on psychotropic medication and mentally retarded prisoners are housed in the most restrictive cellhouse at Old Max (cellhouse 3) along with prisoners in administrative and punitive segregation who are being punished for disciplinary violations. Cellhouse 3 has no resemblance to a treatment ward; it is a segregation unit with small cells that are filthy, inadequately lighted, improperly ventilated and infested with vermin and rodents. Prisoners are locked in their cells over 22 hours a day. No treatment or activities are provided. Prisoners are never allowed out of their cells except for a brief time every other day for showers or yard time. Such restrictive confinement causes irreparable disabilities.

The Department's own Five Year Plan issued in

February 1978 recognized that many of the present cellhouse 3 population do not require the maximum security, highly restrictive regimen typical of cellhouse 3. These individuals require a professional staff experienced in social and psychological needs of disturbed patients. Frequently, because of the low level of individual attention devoted to mentally ill prisoners and because of the high level of sensory deprivation that results from housing individuals in a total isolation environment, prisoners at Old Max are compelled to make suicidal or self-mutilatory gestures in order to attract help. Yet bed space in the infirmary is under utilized because of a lack of staff.

In the summer of 1978, there was a rash of suicides and suicidal attempts by prisoners housed in cellhouse 3. Between April 25 and June 18, 1978 alone, four prisoners in cellhouse 3 succeeded in killing themselves. After these fatalities, the Department set up a special inter-agency crisis committee to address the suicide situation in cellhouse 3. The committee made numerous recommendatios which have been ignored.

The Interagency Crisis Committee found that staffing was totally inadequate to ensure the life and safety of prisoners in cellhouse 3. Moreover, the committee found that the mixture of prisoners in cellhouse 3 is "basically detrimental." The committee reported that:

> The sociopath is found to take brutal advantage of those he can intimidate who have inadequate personalities, low ego images or standard social ethics. There needs to be further separation in relationship to security.

The committee's findings brought the reality of the situation in cellhouse 3 to the attention of defendants Ault and Wilson, yet the situation in cellhouse 3 is as dangerous to-

day as it was a year and a half ago. One resident of cellhouse 3 has never been convicted of a crime. He was deposited there by the State Hospital because he is dangerous. He is also insane and in desperate need of treatment.

In June 1978, the Special Interagency Crisis Committee recommended that the Department seek funding in fiscal 1978-79 for:

> —a ward in the infirmary for acute mental health problems.
>
> —one or more treatment units within the department for long-term psychotics and inadequate offenders and staff it accordingly.
>
> —increased staffing in Cell House 3 to provide at least 1 staff per tier during the day and evening shifts, 3 F.T.E. program/counseling staff per shift, and 1 psychiatric technician per shift.

The Department of Corrections never attempted to implement these recommendations.

Although the Colorado State Hospital has a forensic unit, mental health staff at Old Max have had great difficulty finding bed space for prisoners at Old Max with acute psychiatric problems. CSH makes only five beds available for prisoners to participate in long-term treatment programs. As a result, prisoners with acute mental problems have had to wait as long as 1 1/2 months for space to become available. Even when prisoners are transferred to CSH, they are only there a short time before being returned to the same intolerable conditions at the prison without sufficient follow-up care.

CSH transfers nonconvicted state hospital patients to

Old Max. These patients are housed in cellhouse 3 along with the most dangerous and severely disturbed prisoners in the system and have virtually no access to psychiatric care. In 1973 and 1974 the United States Civil Rights Commission and the Colorado State Grand Jury found that there was a serious problem with housing CSH patients at Old Max because of the lack of opportunity to provide consistent medical and psychiatric assistance to such patients. Despite their findings, this situation has not changed.

The number of drug and alcohol treatment programs available is insufficient to meet the need for the number of prisoners who enter Old Max with drug and alcohol problems and medical needs. The Department has been aware of the enormity and severity of this problem for years. In 1974 and 1975, studies revealed that 68% of prisoners at Colorado State Penitentiary had drug and alcohol problems. Recent data from the Diagnostic Center reveal that 90% of incoming prisoners tested for substance abuse had significant involvement with alcohol and drugs. The Colorado state legislature has expressly stated that "alcoholism and intoxication are matters of statewide concern" and that "the social and economic costs and the waste of human resources caused by alcohol abuse and alcoholism are massive, tragic and no longer acceptable." C.R.S., § 25–1–301(1), (2) (1973). The legislature expressly directed the Division of Alcohol and Drug Abuse of the Department of Health to cooperate with the Department of Corrections in establishing and conducting programs for the prevention of alcoholism and treatment of alcoholics and intoxicated persons in appropriate agencies and institutions. C.R. S., § 25–1–304 (1978). Nonetheless, the evidence reveals that Colorado prisoners

are not even given adequate opportunity to correct drug and alcohol problems. The few programs which exist at Old Max involve only a smidgen of prisoners. Prisoner self-help programs have been disallowed or severely restricted in number by prison officials. Services by outside organizations have been discontinued.

The Department of Corrections has ignored the opportunity to transfer prisoners from Old Max to the Drug Treatment Center at Colorado State Hospital. In the past two years, the Department of Corrections has approved transfer of only one prisoner from Old Max for this program. Even then it took the mental health administrator nine months to get the classification board to approve the transfer and several more months to effectuate it. Similarly, Federal agencies have approved grants to the Colorado Department of Corrections for drug and alcohol treatment only to have the State of Colorado refuse to appropriate the minimal necessary matching funds.

Defendants' disregard of the need of prisoners for drug and alcohol treatment contributes to the totality of conditions which make degeneration probable and self-improvement unlikely. In fact, two thirds of Colorado inmates paroled in recent years had drug or alcohol problems when they were released.

CLASSIFICATION

As Judge Johnson state in *Pugh* v. *Locke,* 406 F.Supp. at 324, "the degree to which [the lack of a working classification system] impedes the attainment of any proper objectives of a penal system cannot be overstated." Colorado has recognized this importance by requiring by statute that the Department of Corrections maintain a diagnostic program which will provide that each prisoner be assigned

> to a correctional institution which has the type of security and, to the extent possible, appropriate programs of education, employment, and treatment available, which are designed to accomplish maximum rehabilitation . . . and to prepare an offender for placement into as productive an employment as possible following imprisonment. C.R.S., § 17–40–102 (1978).

The classification system used in Colorado results in overclassification of prisoners both to and within the maximum security facility. In spite of the clear mandate of the Department of Corrections' policies that no prisoner should be housed in a more secure status than security risk and program needs dictate, at the present time, at least 2/3 of the prisoners housed at the maximum security facility do not require maximum security housing. According to Department data, on April 30, 1979, only 60 of the 586 prisoners housed at the maximum security facility with a maximum security classification should have been so classified. The same data reveals that 137 prisoners at Old Max should have been classified for minimum security.

Because of a continuing lack of bedspace, even those prisoners appropriately classified as less than maximum security are often either housed for lengthy periods of time under maximum security conditions at the Diagnostic Unit or are sent "behind the walls" of Old Max. A number of those who should have been sent to the medium security institution have been sent to Old Max. In addition, over 60 young men who should have been sent to the Reformatory also were sent to Old Max.

In fiscal 1977–78, the Department of Corrections received a grant from the Law Enforcement Assistance Administration for a casework development reporting system which allowed for computerized scoring and

analysis of diagnostic tests. During that same year, the legislature by statute required that a "Colorado Diagnostic Program" be centralized at the Diagnostic Unit adjacent to the old maximum security facility at Canon City. C.R.S., §§ 16–11–308 (1979), 17–40–102 (1978). The Department contracted with Herbert Eber and Psychological Resources, Inc., of Atlanta, Georgia, to develop a computerized classification program (Psychodiagnostic and Risk Assessment System) and an information storage and retrieval system (VISOR). In March 1978, for the first time in Colorado history, the Department promulgated a set of departmental criteria for classification. In spite of the expenditure of federal funds and the availability of fairly impressive computer capabilities, the effects of this recent movement have not corrected the many long existing classification problems.

A person's first housing after being sentenced to prison is in one of 118 cells in the Diagnostic Unit at Canon City. Although the diagnostic process is supposed to take nine days to complete, incoming prisoners stay at the Diagnostic Unit an average of four to five weeks with some staying as long as three months. During that time, the prisoners generally stay locked in their small inadequately lit and windowless cells in the three-tiered cellblock. They are allowed out of their cells for meals, a maximum of one hour of exercise per day, and shower and formal diagnostic requirements. Visitation and canteen services to prisoners in the unit were banned in 1978. In the past six months these have been restored to a limited extent. Prisoners are not allowed to visit the law library. They are allotted a total of two stamps a week for two weeks to correspond. The one television set that was at one time available has been removed. The only reason asserted for the existence of these conditions is lack of staff.

During the time the prisoner is at the Diagnostic Unit, he is given a battery of tests, including three personality inventory tests. The test results are computerized and serve as the core of the automated system for classification. The results are derived by the use of equations devised by Dr. Eber which give various weights to certain answers given to certain questions on two of the personality inventory tests. A narrative print-out statement of the results is produced which purports to predict for classification use the future behavior of the prisoner including violence, escapes, management problems and recidivism. The predictions become a part of the prisoner's permanent file and are available not only to the "programmers" at the Diagnostic Unit (none of whom are licensed clinical psychologist or have adequate training in psychometrics) but also to case managers and other nonprofessional staff. They are also furnished to the parole board. It is unclear to what extent these predictions are used to make security designations within correctional facilities (maximum, close, medium, minimum A and B) or to determine facility placement since any and all professional judgment, diagnosis and predictions are subject to absolute veto or modification by security officers.

Dr. Eber's equations are based upon testing done on prisoners and nonprisoners in Georgia and Alabama. No revalidation studies have been done on those equations; and there has been no revalidation or restandardization of the equations utilized in making predictive judgments of the future behavior of Colorado inmates. Dr. Eber admits that the predictions made are so poor that they should be used for classification only as initial classification by trained and experienced staff when there is no other good evidence available, and future classification instead based on actual behavior prior to and during the first several months of incarceration. Such predictions should only be

used, if at all, by trained clinical psychologists for mental health diagnosis and/or care. They certainly should not be sent to the parole board.

Unfortunately, the predictions are not utilized by trained personnel for legitimate purposes. The criteria listed in the Policy Statement are vague and lack definition. For example, one must be classified maximum if the escape risk potential is "high" or the inmate has "serious adjustment" problems whereas one should be in close custody if the escape risk is "moderate" and there are "adjustment" problems.[12] (DOC Reg. 202-1) Futher, there are serious overclassifications caused by the arbitrarily chosen categorization of people who should be classified "maximum security." For example, neither a need for protection nor a likelihood for self-harm is a rational basis for a blanket requirement of maximum security treatment. Rather, all data concerning each inmate should be viewed in its entirety and considered on an individual basis by trained staff with adequate behavioral information.

Irrational use of bars are even more serious problems for the programmers at Diagnostic Unit in making facility assignments. Under present policy, for example, *all* persons with more than six years remaining for parole eligibility and *all* persons with a class I misconduct report (any assault or "deviate" sexual misconduct) within the past year are to be assigned to the maximum security facility. (DOC REg. 202-1) (Code for Penal Discipline) Obviously, such factors should be taken into account along with other factors in a rational classification scheme. They should not be prohibitions which render all other data meaningless.

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[12]One can be classified medium security if there are "minor adjustment" problems.

Programmers at the Diagnostic Unit also suffer from a lack of information. In thirty per cent of the cases, they do not receive statutorily required presentencing reports from local officials. They are significantly understaffed and cannot spend adequate time interviewing inmates. Because of staff shortages and overwork, they have been forced to discontinue the past practice of contacting people in the community to gain background information. Finally, in spite of the dictates of the Department's own 1977 Master Plan, initial classification decisions are made by only one programmer and not by an institutional team. There is no system for monitoring decisions of the five programmers to assure that similar criteria are being applied in making classifications. (1977 Corrections Master Plan, 5.25).

With all the crippling deficiencies in the classification process at the Diagnostic Unit, the process breaks down further when the prisoner is sent to the maximum security facility with his security designation and a statement of his 'general needs' that may have been identified.[13] The program staff at the Diagnostic Unit has no further participation in individual inmate program decisions. Further, the diagnostic Unit is usually ignored at the maximum security facility. Many decision-makers are not provided relevant information from the packet. The Department has made no follow-up studies to determine the correlation between diagnostic recommendations and actual placement. The lack of coordination of the Diagnostic Unit with other components of the Department which was noted in the 1977 Master Plan still exists. (Master Plan p. 5.15) The plan stated that in order to carry out effective classifica-

[13]The best trained classification personnel are at the Diagnostic Unit. Their past practice of structuring specific programs for prisoners was discontinued because the facilities were unable to meet the program demands. Now facility personnel do specific need classification based upon space available.

tion decisions, the classification committee for each institution should be composed of three people, the institution's program manager, a representative of the security staff and of the professionally trained personnel who perform counseling and casework activity. (Master Plan p. 5.24) The dire results that can occur when one person dominates a fragmented and unverified classification system is amply illustrated by the fact that the Chief Classification Officer at the maximum security prison until November 20, 1978, made, in the words of Dr. Eber, "grossly inappropriate classifications," often with absolutely no factual support for his decisions.[14]

The Master Plan and recommended classification practices have yet to be implemented. Job, program and housing decisions are relegated to separate and diverse components of the prison system and not to centralized and appropriately staffed classification teams. Mark McKinna, a former guard with a social services degree, is the chairman of the Classification Board which determines security classification, meritiorious good time, and assignment to cellhouses 4 and 5. The other two members of the board are selected by McKinna based upon who is available at the time. No effort has been made to bring about maximum staff participation in the process. Major Johnson, the Security Manager, and Captain Gindro, the Intelligence Officer, are often the other two members, particularly when decisions relating to security classification are to be made. A correlation between the composition of the board and the continuing and admitted overclassification at the maximum security facility is apparent.

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[14]Some of those persons who were "grossly inappropriately classified" have still not had their classification adjusted and the inappropriate classification designation are still in the prisoner files.

Curiously, housing assignments within the facility and job assignments are not under the control of McKinna or the Classification Board. Instead, Major Matthews makes housing assignments. The various job supervisors, with total discretion and no departmental criteria, hire prisoners for the few jobs that are available. Inmates are hired on a referral basis from other inmates. No coordinated effort is made to use job assignments as a rehabilitative tool. There is no system in effect to assure equitable distribution of available jobs. Disparate hiring on a racial and ethnic basis is obvious and statistically demonstrable.

The classification process is completely ineffectual. There aren't enough case managers. The few who are employed lack professional training in counseling and other casework activities. Case managers do not have regular and frequent communication with prisoners and do not aid them in obtaining appropriate jobs, housing and program assignments. Case managers have no clout and no means of enforcing their decisions.

No caseworker position existed until December 1978, at which time, five guards with no special education or training were selected to be case managers. Even if they were adequately educated and trained, they would be unable to handle their expected case loads of 185 or more prisoners. They have no support staff and spend an inordinate amount of time doing clerical work. They share inadequate office space with no space for private interviews or counseling. The present case managers do not sit on classification boards; they have no participation in classification decisions, seldom see their clients and cannot hope to comply with requirements for regular program reviews. Some prisoners are not even aware of their case manager's existence.

ACCESS

[4] Access to human contact is an essential human need. Within the prison setting, questions concerning access generally involve visitation, correspondence and assertion of justiciable rights.

a. Visitation

[5] Visitation with family and friends involves fundamental rights of association, privacy, and liberty which are protected by the First, Ninth and Fourteenth Amendments to the Constitution of the United States,[15] yet Section One of the prison regulations until recently gave prison staff complete discretion to revoke or suspend temporarily all visiting privileges. Such regulations are contrary to modern correctional standards which require the superintendent to present clear and convincing evidence that visitation jeopardizes the safety and security of the institution or the visitors before he or his designee can suspend visitation rights. *See* A.C.A. Standard § 4351. A new regulation on visiting was adopted in June 1979. *See* CCF

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[15] Virtually every statement on visitation from the American Correctional Association Manual to the State Association of Correctional Administrators (1972), every national study (e.g., the National Advisory Commission on Criminal Justice Standards & Goals) and every major textbook on corrections stresses the critical nature of visitation both in terms of the reduction of tension inside the prison and the facilitation of the ultimate rehabilitation of the prisoner by strengthening his ties with the "free world." *See* A.B.A., "Tentative Draft of Standards Relating to the Legal Status of Prisoners," 14 *Am.Crim.L.Rev.* 502 (Winter 1977); *See also* A.C.A., *Manual of Standards for Adult Correctional Institutions* §§4210, 4305, 4351 (1977)

Even defendants' Five Year Plan recognizes that the mental agony of family separation is a strong negative factor in the inmate's life and often affects the inmate's participation in otherwise beneficial programs and maintenance of interpersonal relations with staff and other inmates. The inability to communicate privately with a spouse or family member makes the inmate susceptible to decay of family relations.

Regulation 301-19. Some criteria and procedures have been developed. There is no indication that the inmate or visitor has any input to the decision or access to any grievance procedure.

Defendants have denied prisoners at Old Max the opportunity for contact visitation. In August 1976, prison officials converted the visiting room at Old Max from contact to non-contact visiting by constructing concrete walls and plastic barriers to separate prisoners from visitors so no touching was possible. No provision was made for contact visitation for those prisoners whose classification and behavior merited open visiting privileges. The regulations adopted in June 1979 restore some contact visiting. A few plastic barriers have been removed, but contact is still very limited.

Every expert witness in this case, including defendants', has testified to the importance of contact visiting and the debilitating effects caused by the denial of contact visitation. The defendants' 1977 Master Plan recognizes that the denial of contact visits has caused increased tension in the prisoner population. Reasonable limits on visitation, adapted to individual circumstances, and decisions to deny open visitation are not based on reliable facts which indicate that an individual prisoner presents an actual threat, e.g., a clear and present danger, to the security of the institution.

Defendants' visitation policies deny prisoners the opportunity to visit with non-relatives; Colorado only permits a prisoner to visit with friends if the prisoner has no relatives in the state and then allows the prisoner to have only three visitors on an approved list.[16] Moreover, defendants'

[16]A.B.A. Draft Standard § 6.2(c) provides that prisoners should be able to receive any visitor not previously excluded for good cause.

visiting policies and procedures limit the days on which prisoners may visit. Prisoners in different classifications are allowed visits only on particular days of the week. There are a number of days when visits are not allowed at all.

b. Correspondence

Regulations at Old Max permit prison staff to read and inspect all incoming and outgoing general mail and to censor or excluded mail according to certain criteria. Books, newspapers and periodicals may be ordered and paid for by inmates or outside correspondents, but must come directly from the publisher or an established vendor or distributor. Outgoing legal mail can only be opened in "extreme emergency cases, and only when probable cause exists to believe contraband [or improper communications] exists . . . ." CCF Regulation 302-18(6). Incoming legal mail is opened and inspected for contraband in the presence of the inmate.

One policy at the prison refuses to deliver mail in any language other than English, even though one-third of the prison population is Hispanic. Numerous prisoners lack speaking, reading and writing skills in English, as do many of their correspondents.[17]

Defendants also limit receipt of mail, when in the judgment of the mental health staff and the particular inmate's caseworker, certain correspondence "would cause severe emotional disturbance to the [receiving] inmate." CCF Regulation 302-18(7)(b). The problem here is that there are no psychiatrists or even licensed clinicians on the Canon Correctional Facility staff, and the case manage-

[17]The Federal Bureau of Prisons recently deleted from their proposed correspondence regulations the requirement that all inmates write their letters in English. 44 F.R. 35957 (June 19, 1979).

ment system is so inadequate as to be virtually non-existent.

c. Access to the Courts

The law libraries at Old Max fall below any known acceptable standard. The general population law library has approximately half of the law volumes recommended by the American Association of Law Libraries Committee on Law Library Services to Prisoners. The library consists mostly of outdated advance sheets, pocket parts and discards from various sources. The small libraries which have been provided for those in protective custody in cellhouse 7 and those in segregation in cellhouse 3 have fewer materials and are even more inadequate. There is no civilian staff with paralegal or legal training to supervise the libraries or assist inmates with research. A recent evaluation of the prison law libraries recommended that at least two full-time employees be hired to supervise the libraries on a day to day basis.

The general population law library is open five days a week from 9:00 to 11:30 a.m., 12:30 to 3:30 p.m., and, after the evening count, from 7:00 to 9:00 p.m. Only three inmates are allowed in the library during any one of these periods. The smaller libraries in cellhouses 3 and 7 are open for two or three hours in the morning, and again for a similar number of hours in the afternoon. Only one inmate is allowed in each of these libraries at any one time. Sign-up lists for access to the libraries are on a first-come, first-served basis, but inmates with pending litigation have first priority.

No law material can be "checked out" or taken from the libraries, and photocopies costs fifteen cents a page. The limited number of typewriters are in various states of disrepair, and supplies of paper, carbon and other needed items are sporadic and often inadequate.

CONCLUSIONS OF LAW

[6] There is no dispute that "the Constitution does not stop at the prison gate, but rather inures to the benefit of all, even to those citizens behind prison walls." *Battle v. Anderson,* 447 F.Supp. 516, 524 (E.D.Okl.1977), *aff'd,* 564 F.2d 388 (10th Cir. 1977). *See Bell v. Wolfish,* 441 U.S. at 545, 99 S.Ct. at 1877, 60 L.Ed.2d at 472; *Wolff v. McDonnell,* 418 U.S. 539, 555-56, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); and *Cruz v. Beto,* 405 U.S. at 321, 92 S.Ct. 1079. At the same time, " '[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.' " *Pell v. Procunier,* 417 U.S. 817, 822, 94 S.Ct. 2800, 2804, 41 L.Ed.2d 495 (1974) (quoting *Price v. Johnston,* 334 U.S. 266, 285, 68 S.Ct. 1049, 92 L.Ed.1356 (1948)).[18]

[7-9] The primary source of plaintiffs' constitutional attacks on the conditions of confinement at the Canon Correctional facility is the Eighth Amendment's prohibition of cruel and unusual punishment, applicable to Colorado and all other states by way of the Fourteenth Amendment. *See Robinson v. California,* 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). The scope of the Eighth Amendment "proscribes more than physically barbarous punishments," and requires that a government "provide . . . care for those whom it is punishing by incarceration." *Estelle v. Gamble,* 429 U.S. 97, 102-03, 97 S.Ct. 285, 290, 60 L.Ed.2d 251 (1976). Challenges to conditions of prison confinement have been recognized as valid constitutional claims, as such conditions may constitute cruel and

[18]The Supreme Court recognized four functions of a corrections system in *Pell v. Procunier,* 417 U.S. 817, 822-23, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974): deterrence, confinement of criminal offenders, rehabilitation, and internal security.

unusual punishment. *See, e.g., Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251; *Wilwording v. Swenson,* 404 U.S. 249, 92 S.Ct. 407, 30 L.Ed.2d 418; *Battle v. Anderson,* 376 F.Supp. 402 (E.D.Okl.1974), subsequent opinion, 447 F.Supp. 516 (E.D.Okl.1977), *aff'd,* 564 F.2d 388 (10th Cir. 1977); *Holt v. Hutto,* 363 F.Supp. 194 (E.D.Ark.1973), *aff'd in relevant part, rev'd in part and remanded sub nom. Finney v. Arkansas Board of Corrections,* 505 F.2d 194 (8th Cir. 1974), *on remand, Finney v. Hutto,* 410 F.Supp. 251 (E.D.Ark.1976), *aff'd* 548 F.2d 740 (8th Cir. 1977), *aff'd,* 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978); *Newman v. Alabama,* 349 F.Supp. 278 (M.D.Ala. 1972), *aff'd in relevant part,* 503 F.2d 1320 (5th Cir. 1974), *cert. denied,* 421 U.S. 948, 95 S.Ct. 1680, 44 L.Ed.2d 102 (1974).[19]

In *Clappier v. Flynn,* 605 F.2d 519, 533-34 (10th Cir. 1979), the Tenth Circuit recently addressed the issues of liability under Section 1983 for omissions or failures to

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[19]Defendants at several points of this litigation have argued that *Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), requires that a condition or practice first be found to constitute "punishment" before it can then be determined whether it is "cruel and unusual." The issue was central in *Bell v. Wolfish* because most of the persons confined at the Metropolitan Correctional Center were federal pretrial detainees who had been charged with crimes but not yet convicted. While the parties conceded that such persons can be legitimately confined by a government prior to a determination of their guilt or innocence, *id,* 99 S.Ct. at 1865, 60 L.Ed.2d at 458, these persons could not be subjected to punishment. The question, then, as framed by Justice Rehnquist for the majority, was whether conditions at the MCC "amount[ed] to punishment of the detainee" in violation of Fifth Amendment due process. *Id.,* 99 S.Ct. at 1872, 60 L.Ed.2d at 466. For a convicted inmate, on the other hand, confinement in a penal institution *is* punishment. The Supreme Court has recognized that inadequate attention to prisoners' medical needs may constitute cruel and unusual punishment, even though I assume, with some misgivings, that medical care is not intended as punishment. *See Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

act, which characterize many, if not most, of the problems which plaintiffs have suffered at the Canon Correctional Facility.

> [T]he area of concern in terms of a Sec. 1983 liability involving an allegation of cruel and unusual punishment *relating to a claimed omission* requires proof of exceptional circumstances and conduct so grossly incompetent, inadequate or excessive as to shock the conscience or to be intolerable to basic fairness. Such, in our view, is consistent with those opinions interpreting the term 'cruel and unusual punishment' forbidden by the United States Constitution as meaning something inhuman, barbarous, violative of basic concepts of decency and so foul as to shock the court's sensibilities. *Trop v. Dulles,* 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958); *Weems v. United States,* 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910); . . .
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> In *Battle v. Anderson,* 376 F.Supp. 402 (E.D.Okl.1974); *aff'd,* . . ., the District Court stated that while the Eighth Amendment does not have fixed, settled and definite limits, still 'cruel and unusual punishment' exists if prisoners are maintained in a manner fairly characterized as foul, inhuman and violative of basic concepts of human decency. [Emphasis in the original.]

Plaintiffs have shown that grossly inadequate conditions exist at the Canon Correctional Facility.[20]

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[20]As the Court of Appeals recognized in *Clapier,* trial courts "[have been] provided scant guidance in this difficult area." *Clappier v. Flynn,* 605 F.2d 519, 533 (10th Cir. 1979). For a discussion of the various standards and approaches that lower courts have taken, *see* Robbins, *Federalism, State Prison Reform, and Evolving Standards*

PHYSICAL ENVIRONMENT

[10, 11] The Supreme Court has recognized a matrix for determining whether certain conditions of confinement are constitutionally unacceptable. *See Bell v. Wolfish*, 99

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of Human Decency: On Guessing, Stressing, and Redressing Constitutional Rights, 26 Kan.L.Rev. 551 (1978). In *Baker v. McCollan*, 443 U.S. 137, 139, 99 S.Ct. 2629, 2692, 61 L.Ed.2d 433, 439 (1979), the Supreme Court noted the difficulty of resolving the scope of liability under Section 1983:

> [T]he question whether an allegation of simple negligency is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action. In any event, before the relationship between the defendant's state of mind and his liability under § 1983 can be meaningfully explored, it is necessary to isolate the precise constitutional violation with which he is charged.

The "precise constitutional violation" at issue here is whether conditions of confinement at the Canon Correctional Facility are cruel and unusual punishment in violation of the Eighth Amendment. While the Supreme Court, in according prison administrators deference, has used such language as "deliberate indifference," *Estelle v. Gamble*, 429 U.S. 97, 104-05, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), and "exaggerated response," *Pell v. Procunier*, 417 U.S. 817, 827, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974), I am in complete agreement with Justice Stevens' dissenting opinion in *Estelle v. Gamble*, 429 U.S. at 108-17, 97 S.Ct. at 293-97, 50 L.Ed.2d at 267 n. 13. The question under the Eighth Amendment is whether a form of punishment is cruel and unusual in its execution. When there has been a failure on the part of an institution as a whole to meet constitutional minima and that failure is shown by substantial evidence, there has been a violation of the Eighth Amendment. As Justice Stevens said in *Estelle*,

> Subjective motivation may well determine what, if any, remedy is appropriate against a particular defendant. However, whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted

S.Ct. at 1875-76, 60 L.Ed.2d at 470-71; *Hutto v. Finney,* 437 U.S. at 685-87, 98 S.Ct. 2565. On one side of the matrix are conditions of confinement; on the other are various durations of confinement. The shorter the duration of confinement, the more spartan are the allowable conditions. As the Court said in *Hutto v. Finney,* "the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards. A filthy, overcrowded cell and a diet of 'grue' might be tolerable for a few days and intolerably cruel for weeks or months." *Id.* at 686-87, 98 S.Ct. at 2572. At the Canon Correctional Facility, inmates are placed in substandard living conditions for a variety of reasons – because they are "transitional workers," or in alleged need of protective custody, or simply because there is no room at lesser security prisons, none of which are justified as short-term

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> it. Whether the conditions in Andersonville were the product of design, negligence, or mere poverty, they were cruel and inhuman.

Id. at 116-17, 97 S.Ct. at 297, 50 L.Ed.2d at 267-68 (footnote omitted). (Similar reasoning is implicit in the decisions of the trial court and court of appeals in *Battle v. Anderson.* The lower court said that neither good will nor lack of financing was a defense "to a failure to provide minimum constitutional standard," 447 F.Supp. at 526, and the court of appeals said that certain otherwise reasonable fears and "significant progress in correcting many of the abuses and/or providing for new or additional facilities" was likewise not an excuse for continuing constitutional violations. 564 F.2d at 403.) Still, while my heart is with Justice Stevens, jurisprudence is with those decisions endorsed by a majority of the court. Even so, as set out in this opinion, I find that the conditions of confinement at the Cannon Correctional Facility meet all tests by all known measures of proof. As shown by substantial evidence, these conditions shock the conscience, are incompatible with evolving standards of decency, involve unnecessary and wanton infliction of pain, and evidence both deliberate indifference to the prisoners' protected interests and "circumstances and conduct so grossly incompetent, inadequate or excessive as . . . to be intolerable to basic fairness." *Clappter v. Flynn,* 605 F.2d at 533.

disciplinary measures.[21] Those conditions are instead the day to day character of confinement at the Canon Correctional Facility.

[12] In *Battle v. Anderson,* the Tenth Circuit affirmed an order which adopted the American Public Health Association standard of 60 square feet as the constitutional minimum for cells in which inmates of a general population are routinely confined. 564 F.2d at 395. Cells in cellhouses 1 and 7 are almost half this size, and grossly inadequate under any standard. Additionally, the 60 square foot standard is premised on the assumption that inmates are outside of their cells for a substantial part of the day, engaging in either vocational, educational or recreational activities. The evidence in this case shows, however, that a substantial number of prisoners at Old Max, particularly those in cellhouse 3, are locked in their cells from 20 to 23 hours a day. For persons confined for such long periods of time, the American Correction Association standards call for 80 square feet, and I find that to be the constitutional minimum for any prisoner confined in his cell for 20 or more hours a day.[22]

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[21]In fact, each of these reasons is offered as an excuse for some of the major problems evidenced in this case: lack of jobs, inadequate security, and overcrowding of the state's correctional facilities.

[22]Even with regard to the lower requirement for inmates outside their cells for substantial periods of time, the trial court in *Battle* recognized that a number of accepted and approved standards require significantly greater space than the 60 square feet which it adopted. *See* 447 F.Supp. at 525. In addition, I emphasize that these standards are not necessarily applicable to short-term disciplinary confinement. As I stated above, the conditions addressed here are the general character of confinement even for those who have not been charged with any misconduct.

The conditions at the Canon Correctional Facility stand in stark contrast to those at the Metropolitan Correctional Center which was the subject of the litigation leading up to *Bell v. Wolfish,* 441 U.S.

[13] In addition to physical space, courts have considered the totality of environmental health and safety conditions in determining whether that environment is constitutionally acceptable. *See, e.g., Williams v. Edwards,* 547 F.2d 1206 (5th Cir. 1977); *Palmigiano v. Garrahy,* 443 F.Supp. 956 (D.R.I.1977), *appeal dismissed,* 599 F.2d 17 (1st Cir. 1979); *Pugh v. Locke,* 406 F.Supp. 318 (M.D.Ala.1976), *aff'd and remanded sub nom., Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), cert. denied in relevant part sub nom., Alabama v. Pugh,* 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978); *Battle v. Anderson,* 376 F.Supp. 402 (E.D. Okl. 1974), *subsequent opi-*

520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). In its decision the Supreme Court remarked:

> The MCC differs markedly from the familiar image of a jail; there are no barred cells, dank, colorless corridors, or clanging steel gates. [Constructed in 1975,] [i]t was intended to include the most advanced and innovative features of modern design of detention facilities. As the Court of Appeals stated: '[I]t represented the architectural embodiment of the best and most progressive penological planning.' 573 F.2d at 121. The key design element of the 12-story structure is the 'modular' or 'unit' concept, whereby each floor designed to house inmates has one or two largely self-contained residential units that replace the traditional cellblock jail construction. Each unit in turn has several clusters or corridors of private rooms or dormitories radiating from a central 2-story 'multi-purpose' or common room, to which each inmate has free access approximately 16 hours a day.

Id., 99 S.Ct. at 1866-67, 60 L.Ed.2d at 459-60. In addition to the relatively short seven or eight hour periods during which prisoners or detainees were required to remain in their cells, "50% of *all* MCC inmates spent less than 30 days at the facility . . . [and], of the unsentenced detainees, over half spent less than 10 days at the MCC [and] three quarters were released within a month . . . ." *Id.,* 99 S.Ct. at 1866 n.3, 60 L.Ed.2d at 549 n. 3.

nion, 447 F.Supp. 516 (1977), *aff'd,* 564 F.2d 388 (10th Cir. 1977); *Gates v. Collier,* 349 F.Supp. 881 (N.D.Miss.1972), *aff'd,* 501 F.2d 1291 (5th Cir. 1974); and *Holt v. Sarver,* 309 F.Supp. 362 (E.D.Ark.1970), *aff'd,* 442 F.2d 304 (8th Cir. 1971). The evidence shows that the conditions at the Canon Correctional Facility – in virtually all areas except the new administration building[23] – regarding hygiene and sanitation, heat, ventilation, weather-proofing, fire protection, lighting and plumbing have long been serious problems, and that many are outright dangers to health and safety. The physical facilities are in such a state of age, disrepair and obsolescence that numerous experts and officials, including defendants, have concluded that the massive renovation that would be required to make the Canon Correctional Facility habitable is both physically and economically impractical. The conditions are grossly inadequate and constitutionally impermissible.

PHYSICAL SAFETY

[4] In *Woodhous v. Commonwealth of Virginia,* 487 F.2d 889, 890 (4th Cir. 1973), the Fourth Circuit said that "[a] prisoner has a right, secured by the Eighth and Fourteenth Amendments, to be reasonably protected from constant threat of violence and sexual assault by his fellow inmates, and he need not wait until he is actually assaulted to obtain relief." Other courts have agreed. *See Williams v. Edwards,* 547 F.2d at 1213; *Palmigiano v. Garrahy,* 443 F.Supp. at 980; and *Pugh v. Locke,* 406 F.Supp. at

[23]This includes cellhouses, common and program areas, and kitchen facilities.

329-30.[24] While violence at Old Max has been significantly reduced the threat of occurrence is omnipresent. The random design and construction of Old Max has caused a large number of blind spots where violence and other illicit activities can go on completely unobserved. Four reports have concluded that the physical layout of the prison makes it virtually impossible to provide safety.[25]

[15] No matter what physical changes are made, the grossly inadequate staff could never cure the problem. The staff which does exist is largely preoccupied with self-protection and maintaining control of the prison. While various reports have recommended substantial increases in staffing, security staff at the Cannon Correctional Facility actually decreased in fiscal year 1978-79. While prison security is not the only goal, it is a central one, *Pell v. Procunier,* 417 U.S. at 823, 94 S.Ct. 2800, and effective programs cannot be implemented except in an environment in which both staff and inmates are reasonably secure. The lack of safety at Old Max deprives prisoners of one right and prevents the fulfillment of others.

IDLENESS

[16] While there is no constitutional right to rehabilitation, the law of this circuit is clear that the Eighth Amendment protects an inmates "from an environment where degeneration is probable and self-improvement unlikely

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[24]The Colorado Court of Appeals has recognized the state's duty to assure inmate safety and has permitted prisoners who have fled from Canon City, after allegedly being beaten and raped, to raise the state's failure to protect as a defense to the crime of escape. *See Colorado v. Trujillo,* Colo.App., 586 P.2d 235 (1978).

[25]While the certified plaintiff class only includes inmates at the Canon Correctional Facility, the prison staff also has a very real and legitimate interest in their own safety, which is likewise ill-served by the prison's condition.

because of the conditions existing which inflict needless suffering, whether physical or mental." *Battle v. Anderson,* 564 F.2d. at 403.[26] Idleness at the Canon Correctional Facility is pervasive, and "[t]he sad truth is that Colorado is now operating its maximum security prison by locking down prisoners for substantial periods of time in 2 of its 3 major cellblocks (cellhouses 3 and 7)." Plaintiffs' Trial Brief, at 25. In addition, a 1973 American Correctional Association report found that idleness was responsible for more problems at Old Max than any other factor. Rather than improving, idleness at Old Max has worsened progressively. Prison industries have been discontinued, educational programs cut back, and other constructive activities, such as discussion or self-help groups, limited. I cannot, and will not, "second guess" the prison administrators in trying to say which of these individual decisions might have been unjustified. The fact is that the overall effect is to create conditions of idleness and lockdown that make degeneration likely and self-improvement impossible.

[17] I have stated elsewhere, and I will hazard saying it again, that the above conditions are not being imposed as a matter of short-term disciplinary action.[27] Instead, the system at Old Max imposes its own form of Catch-22 on a vast number of the inmate population. "Transitional workers" are inmates who are eligible for jobs but are idle because not enough jobs are available. As a result, they spend up to 20 hours a day in their cells and cannot participate in various other activities because they are not

[26]The Supreme Court has said that a "paramount objective of the corrections system is the rehabilitation of those committed to its custody." *Pell v. Procunier,* 417 U.S. at 823, 94 S.Ct. at 2804.

[27]Of course, disciplinary confinement is also subject to constitutional limitations. *See, e.g., Hutto v. Finney,* 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978); *Gregory v. Wyse,* 512 F.2d 378 (10th Cir. 1975); *Battle v. Anderson,* 376 F.Supp. at 422, 423-24.

workers. They are not workers only because the prison does not provide jobs.[28]

The same situation is true of inmates in protective custody: they are there because confinement in the general population would be unsafe, not because they are otherwise ineligible to participate in productive activities. Courts have recognized that where the prison system itself has

> created the conditions that necessitate the widespread use of protective custody, where the totality of conditions of protective custody violate the Eighth Amendment, and where the restrictions complained of amount to additional punishment for which no penological explanation is offered, the additional restrictions are offensive to due process and equal protection and must be enjoined.

Palmigiano v. *Garrahy,* 443 F.Supp. at 982 (citations omitted).

Finally, the same applies to those inmates who are in administrative segregation in cellhouse 3 not as punishment but because of special management problems. Perhaps a number of those inmates should not be at the Canon Correctional Facility at all,[29] but there is no legitimate reason for their categorical exclusion from productive activity.

[18] Colorado has provided by statute that "[e]very able-bodied offender shall be put to and kept at the work most

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[28]In addition, because they are not workers, they cannot earn statutory good time credit. *See* C.R.S. § 17-20-107 (1973).

[29]*See* opinion at 157-158, *infra.*

suitable to his capacity and most advantageous to the people of this state." C.R.S., § 17-20-117 (1978). *Also see* C.R.S., § 17-20-115 (1978). In the legislative declaration of the Correctional Industries Act, the general assembly has stated:

> The general assembly hereby finds and declares that the means now provided for the employment of offenders are inadequate to allow a forty-hour-week work assignment for all able-bodied offenders and for correctional industries programs to be operated on a financially profitable basis. Therefore, it is the intent of the general assembly in this article to:
>
> (a) Create a division of correctional industries . . . which assumes responsibility for training offenders in general work habits, work skills, and specific training skills that increase their employment prospects when released;
>
> (b) Develop industries that provide forty hours of work activity each week for all able-bodied offenders; [and]
>
> (c) Provide an environment for the operation of correctional industries that closely resembles the environment for the business operations of a private corporate entity; . . .

C.R.S., § 17-24-102(1) (1978).[30] While the Constitution may not specifically require that all prisoners be provided

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[30]The correctional industries program is not a recent response to problems at the Canon Correctional Facility. It was originally enacted in 1965, when the legislature declared that "the means [then] provided for the employment of prison labor [were] inadequate to furnish a sufficient number of prisoners with employment." Correctional In-

jobs, Colorado does. *Cf. Palmigiano* v. *Garrahy,* 443 F.Supp. at 980.

[19] In prison condition cases, courts have not hesitated to order officials to provide meaningful educational programs. *See, e.g., Palmigiano* v. *Garrahy,* 443 F.Supp. at 989; Laaman v. *Helgemoe,* 437 F.Supp. 269, at 329-30; *Mitchell* v. *Untreiner,* 421 F.Supp. 886, 901 (N.D.Fla. 1976); and *Alberti* v. *Sheriff of Harris County,* 406 F.Supp. 649, 673 (S.D. Tex. 1975). One civilian teacher for a population of 800-900 prisoners and an effective budget of $3,000 is ridiculous even as a joke much less as a reality.

[20] Recreation programs at Old Max are limited and the vast majority of these are athletic in character. Access to the gym is limited even for those in the general population, and almost nonexistent for those in the "special" populations such as administrative segregation and protective custody. While "sophisticated" programs may not be required, "the right to reasonable opportunities for exercise is fundamental." *Laaman* v. *Helgemoe,* 437 F.Supp. at 309. *Accord, Palmigiano* v. *Garrahy,* 443 F.Supp. 567, 574-75 (D.Neb. 1976). Especially here, where prison life for most inmates is characterized by idleness and prolonged daily confinement in their cells, adequate exercise is

dustries Act of 1965, C.R.S., § 105-8-1 (1965) (later C.R.S., § 27-25-102 (1973)). In emphasizing the purpose that "all provisions of this article shall be construed to rehabilitate prisoners with the intent of placing released prisoners back in society in a useful, productive manner." *id.*, it is significant that 12 years later, when the general assembly recodified the program at C.R.S., § 17-24-101 (1977), it would still find employment opportunities inadequate. While some improvements were made during the 12 year period, the evidence in this case makes it highly questionable that inmate employment during recent years has even approximated what it was in 1965.

critical. *See Battle* v. *Anderson,* 376 F.Supp. at 424. Its relationship to the maintenance of health is obvious.

HEALTH CARE

[21] Of the many problems at Old Max, the blatant inadequacy of health care is perhaps the most appalling — despite the fact that courts have recognized that inmates have a fundamental right to receive needed care. *See Estelle* v. *Gamble,* 429 U.S. at 103-05, 97 S.Ct. 285; *Todaro* v. *Ward,* 565 F.2d 48, 52-53 (2d Cir. 1977); *Palmigiano* v. *Garrahy,* 443 F.Supp. at 983-4; *Laaman* v. *Helgemoe,* 437 F.Supp. at 311-15; and *Battle* v. *Anderson,* 376 F.Supp. at 424. As the Supreme Court said in *Estelle:*

> An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical 'torture or a lingering death,' . . . . In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. Cf. *Gregg* v. *Georgia* [428 U.S. 153), supra, at 173 [96 S.Ct. 2909, 2924-25, 49 L.Ed. 2d 859] . . . .The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common-law view that 'It is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.'

429 U.S. at 103-04, 97 S. Ct. at 290-291 (citations and footnotes ommitted).

The failures of Old Max extend across the board from inadequate staff and resources to insufficient transportation arrangements to lack of training and qualification of the limited staff that does exist. The problem is not simply a matter of isolated incidents of alleged negligence or difference of opinion. It is a matter of such large scale failure as to evidence deliberate indifference to serious health needs. As I ruled from the bench, I consider the health care problems at Old Max an emergency situation and a matter of first importance.

[22] Staffing is grossly inadequate. The primary care physician who has responsibility for the entire medical program is paid on a part-time basis and spends only three to five hours a week at the prison on actual patient care. Physician assistants who are not registered nurses are often the only persons on hand. There is no provision for qualified care on a 24-hour a day, 7-day a week basis. A psychiatrist sometimes comes to the prison once a month, and there is not a single Ph.D. trained psychologist on the prison staff. There are only three mental health counselors and none are Colorado-licensed as qualified clinicians. Mental health "treatment" is at best a matter of crisis intervention. The overall shortage of qualified staff endangers the health of the inmate population and is of constitutional magnitude. *See, e.g., Laaman* v. *Heigemoe,* 437 F.Supp. at 312; *Battle* v. *Anderson,* 376 F.Supp. at 415-16. *Also see Battle* v. *Anderson,* 457 F.Supp. 719, 727-29 (E.D.Okl. 1978).

Because health services at Old Max are so limited, almost any substantial sort of medical, dental or psychiatric care must be performed elsewhere, primarily at the State Hospital in Pueblo. There is a single vehicle for transportation of inmates to Pueblo, and it is subject to competing uses, causing serious backlogs of persons

waiting for needed care. Space for mental nealth problems from Old Max is severely limited at the State Hospital, causing most inmates suffering from those problems to be "warehoused" in administrative segregation, subject to the debilitating conditions of cellhouse 3. This is true despite the fact that Colorado law provides for the transfer of these inmates to mental health facilities.

> If. . . the executive director is of the opinion that [a] prisoner is mentally ill or retarded and cannot be well taken care of in the Colorado state reformatory or the state penitentiary, it is his duty to place said mentally ill or retarded prisoner without delay in an institution for the care and treatment of the mentally ill or retarded, there to be treated and confined . . . .

C.R.S., § 17-23-101(2) (1978). The evidence is compelling that inmates with mental health needs "cannot be well taken care of" at Old Max[31]

Finally, despite indications that the vast majority of inmates come to the Canon Correctional Facility with drug and alcohol problems, treatment programs are wholly inadequate and do not conform to the purpose of C.R.S., § 25-1-304 (1978) to establish programs in conjunction with the Division of Alcohol and Drug Abuse of the Department of Health.

CLASSIFICATION

[23, 24] While there is no constitutional right to classification as such, a valid classification system pro-

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[31]On the rights of mentally ill persons in state custody, *see generally Romero v. Schauer,* 386 F.Supp. 851 (D.Colo.1974) (three-judge court).

vides a reasonable method by which prison officials can protect and afford to inmates other constitutional rights such as safety and medical care. As the district court said in *Palmigiano* v. *Garrahy,* 443 F.Supp. at 965 (footnote omitted):

> Classification is essential to the operation of an orderly and safe prison. It is a prerequisite for the rational allocation of whatever program opportunities exist within the institution. It enables the institution to gauge the proper custody level of an inmate, to identify the inmate's educational, vocational and psychological needs, and to separate non-violent inmates from the more predatory. These goals are recognized by state law, which provides that classification shall serve a rehabilitative function. Classification is also indispensable for any coherent future planning.

Accord, Doe v. *Lally,* 467 F.Supp. 1339, 1353 (D.Md. 1979); *Pugh* v. *Locke,* 406 F.Supp. at 324. When a classification system is established, however, its decisions "cannot be arbitrary, irrational or discriminatory," *Laaman* v. *Helgemoe,* 437 F.Supp. at 318, since inmates are not deprived of all protection of due process and equal protection. *See Wolff* v. *McDonnell,* 418 U.S. 539, 555-56, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); *Lee* v. *Washington,* 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968) (per curiam); and *Pugh* v. *Locke,* 406 F.Supp. at 330.[32]

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[32]*Cf. Gregg v. Georgia,* 428 U.S. 153, 188-89, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Furman v. Georgia,* 408 U.S. 238, 242-57, 274-77, 309-10, 312-13, 363-66, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (concurring opinions of Douglas, Brennan, Stewart, White and Marshall, JJ., respectively) (infliction of severe punishment unconstitutional where arbitrary, capricious or discriminatory).

[25-31] The due process clause of the Fourteenth Amendment does not itself create a protected interest in the initial assignment of offenders to a particular place of confinement. Such an interest, if it exists, is created by state law. *See Meachum* v. *Fano,* 427 U.S. 215, 224-27, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976); *Montanye* v. *Haymes,* 427 U.S. 236, 242-43, 96 S.Ct. 2543, 49 L.Ed.2d 466 (1976). Colorado has enacted a diagnostic and classification program at C.R.S., § 17-40-102 (1978). In doing so, the general assembly said:

The primary function and purpose of the program shall be to provide a diagnostic examination and evaluation of all offenders sentenced by the courts of this state, so that each such offender may be assigned to a correctional institution which has the type of security and, to the extent possible, appropriate programs of education, employment, and treatment available, which are designed to accomplish maximum rehabilitation of such offender and to prepare an offender for placement into as productive an employment as possible following imprisonment. *Id.* at 17-40-102(2). All offenders are to be processed through the diagnostic services which have been centralized at the Canon Correctional Facility in order to identify their treatment and employment needs. A recommendation is then made as to their place of confinement. *See* C.R.S., §§ 16-11-308 and 17-40-103 (1978). I have held in a somewhat related case that Colorado law and regulation create a protected liberty interest in classification decisions. *See Marioneaux* v. *Colorado State Penitentiary,* 465 F.Supp. 1245, 1248 (D.Collo. 1979). *Accord, Gurule* v. *Wilson,* Consolidated Civil Action No. 74-A-926 (D.Colo. April 3, 1978). *Cf. Palmigiano* v. *Garrahy,* 443 F.Supp. at 980-82; *Anderson* v. *Redman,* 429 F.Supp. 1105, 1121-22 (D.Del. 1977). It is well-established that "due process is

flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). In according deference to prison officials and accommodating "institutional needs and objectives and the provisions of the Constitution," *Wolff* v. *McDonnell,* 418 U.S. at 1556, 94 S.Ct. at 2975, due process does not require a hearing at the initial classification stage. *See Laaman* v. *Helgemoe,* 437 F.Supp. at 319. Interviews with an inmate must be part of the process, and the statutes require that a requesting inmate generally be shown a copy of the recommendation and receive an explanation. *See* C.R.S., §§ 16-11-308(4) and 17-40-103(2) (1978).[33] Due process and equal protection do require that a classification system bear some rational relationship to the object being sought. Defendants have said that a classification system that separates prisoners by "age, offense, physical aggressiveness, or other criteria" is constitutionally valid, citing *Goldsby* v. *Carnes,* 365 F.Supp. 395, 402 (W.D.Mo. 1973), *modified by consent,* 429 F.Supp. 370 (W.D.Mo. 1977). As a general proposition, I agree. There are a number of ways that inmates might be classified in a manner that comports with due process and equal protection. But the evidence in this case raises substantial doubt about the validity of the classification system which defendants have adopted. No acceptable validation study has been performed, and Dr. Eber admits that the predictions are so poor that they should only be used in making initial decisions and then only when no other significant information is available. After that, says Dr. Eber, classifica-

[33]Due process requires more where disciplinary proceedings are involved, *Wolff v. McDonnell,* 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), or where inmates are regressively classified. *Marioneaux v. Colorado State Penitentiary,* 465 F.Supp. 1245, 1248 (D.Colo.1979).

tion decisions should be based on an inmate's actual behavior.[34]

The basic failure of the diagnostic and case management program at Old Max is that the information is almost meaningless in making facility assignments and in affording inmates the various program opportunities which the diagnostic survey has recommended. The evidence shows that overclassification is the rule, not the exception, and that large numbers of inmates are housed at Old Max even though they have been classified for lesser security facilities.[35] In fact, actual departmental regulations make the diagnostic recommendation totally irrelevant where, for instance, an inmate has more than six years remaining before parole eligibility. In such cases, the inmate is automatically confined at Old Max.[36] Finally, no matter what rehabilitation or vocational program is recommended, the evidence shows that the diagnostic procedure is mostly in vain, since programs are not in fact available. Though capable of redemption, the classification system is presently unconstitutional.

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[34]I do not hold that an offender has a protected interest in any particular classification decision. Once a classification procedure is validated in an acceptable manner, individual decisions will not be subject to review except on a showing of abuse or bad faith in its application.

[35]Both situations – overclassification and "over" assignment – are evidenced by the planned capacity at the new maximum security facility of approximately 340 as compared to the present Old Max population of 850 inmates.

[36]Defendants have said that a "variance" from this regulation is possible, but the evidence shows that only a relative handful have been granted.

ACCESS

[32, 33] The Supreme Court of the United States has held that "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections sytem." *Pell* v. *Procunier,* 417 U.S. at 822, 94 S.Ct. at 2804. Although the fact of confinement and the needs of the prison may impose some limitations on the inmate's constitutional rights, restrictions must be reasonable and must be justified by legitimate policies and goals of the corrections system. *See Jones* v. *North Carolina Prisoners' Union,* 433 U.S. at 129-30, 97 S.Ct. 2532.

Restrictions on visitation are particularly critical since they may prevent inmates from maintaining meaningful family bonds and community ties which promote rehabilitation and successful return to society. As the district court said in *Pugh* v. *Locke,* 406 F.Supp. at 327:

> The chances of successful rehabilitation or the chances of escaping mental and physical degeneration are also diminished by the fact that prison environment is much different from that in the society to which an inmate must return. Current visitation policies discourage visits — which are essential to the maintenance of community ties — and therefore decrease an inmate's chances of successful reintegration upon release.

Accord, Laaman v. *Helgemoe,* 437 F.Supp. at 320; *Wesson* v. *Johnson,* Colo., 579 P.2d 1165 (1978) (en banc) (pretrial detainees).

[34, 35] Restrictions on family visits must be accommodated with clear constitutional protection of family life. The Supreme Court recently surveyed this area in *Moore* v. *City of East Cleveland,* 431 U.S. 494, at 499, 97

S.Ct. 1932, at 1935-1936, 52 L.Ed.2d 531 (1977) and stated:

'This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.' *Cleveland Board of Education* v. *La Fleur,* 414 U.S. 632, 639-640 [94 S.Ct. 791, 796, 39 L.Ed.2d 52] (1974). A host of cases, tracing their lineage to *Meyer* v. *Nebraska,* 262 U.S. 390, 399-401 [43 S.Ct. 625, 626-627, 67 L.Ed. 1042] (1923), and *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534-535 [45 S.Ct. 571, 573-574, 69 L.Ed. 1070] (1925), have consistently acknowledged a 'private realm of family life which the state cannot enter.' *Prince* v. *Massachusetts,* 321 U.S. 158, 166 [64 S.Ct. 438, 442, 88 L.Ed. 645] (1944). See, *e.g., Roe* v. *Wade,* 410 U.S. 113, 152-153 [93 S.Ct. 705, 726-727, 35 L.Ed.2d 147] (1973); *Wisconsin* v. *Yoder,* 406 U.S. 205, 231-233 [92 S.Ct. 1526, 1541-1542, 32 L.Ed.2d 15] (1972); *Stanley* v. *Illinois,* 405 U.S. 645, 651 [92 S.Ct. 1208, 1212, 31 L.Ed.2d 551] (1972); *Ginsberg* v. *New York,* 390 U.S. 629, 639 [88 S.Ct. 1274, 1280, 20 L.Ed.2d 195] (1968); *Griswold* v. *Connecticut,* 381 U.S. 479 [85 S.Ct. 1678, 14 L.Ed.2d 510] (1965); *id.,* at 495-496 [85 S.Ct. 1678, at 1687-1688] (Goldberg, J., concurring); *id.,* at 502-503 [85 S.Ct. 1678, at 1691-1692] (White, J., concurring); *Poe* v. *Ullman,* 367 U.S. 542-544, 549-553 [81 S.Ct. 1752, 1776-1777, 6 L.Ed.2d 989] (1961) (Harlan, J., dissenting); *cf. Loving* v. *Virginia,* 388 U.S. 1, 12 [87 S.Ct. 1817, 18 L.Ed.2d 1010] (1967); *May* v. *Anderson,* 345 U.S. 528, 533 [73 S.Ct. 840, 843, 97 L.Ed. 1221] (1953); *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U.S. 535, 541 [62 S.Ct. 1110, 1113, 86 L.Ed. 1655] (1942). Of course, the family is not beyond regulation. See *Prince* v. *Massachusetts, supra* [321 U.S.]], at 166 S.Ct. 438, at 442]. But when the

government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation. See *Poe* v. *Ullman, supra* [367 U.S.], at 554 [81 S.Ct. 1752, at 1782] (Harlan, J., dissenting).

As with other constitutional protections, some of these are withdrawn to varying degrees when a person is legally incarcerated as punishment. The most obvious are those involving procreation, since conjugal visits are not yet recognized as a constitutional right. But other family interests survive, and like First Amendment ones, can only be limited on account of important governmental interests and only by restrictions which are not unnecessarily broad. *Cf. Procunier* v. *Martinez,* 416 U.S. 396, 413-14, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974).

[36] The present restrictions on family visits at Canon City are overbroad and prevent or impair meaningful visitation without being necessary to any legitimate penological purpose. Individual cases which present security problems or in which there has been a previous abuse of visitation rights may be dealt with by prison officials by means other than blanket restrictions on all inmates. Where there is a valid reason to believe that visitation rights have been abused in a particular case, prison officials may take reasonable steps to investigate and, if necessary, to correct the situation, but a general, undifferentiated suspicion of all inmates, all visitors and all visits does not allow the overly broad procrustean restraints which are presently in effect. Those restraints are an exaggerated and excessive response to concerns for prison security.

[37, 38] The constitution affords less protection to visits by those who are not family members. Restrictions on the

freedom to associate are predictable consequences of incarceration. Prison security justifies greater restrictions on these visits than those involving family. *See generally Hardwick* v. *Ault,* D.C., 447 F.Supp. 116, at 131; *Laaman* v. *Helgemoe,* 437 F.Supp. at 320-22; and *Hamilton* v. *Saxbe,* 428 F.Supp. 1101, 1109-1113 (N.D.Ga. 1976). Still, an absolute ban on visits by non-relatives is not a regulation "wisely adapted to individual circumstances . . . or included in general rules which allow prisoners reasonable visitation." *Newman* v. *Alabama,* 559 F.2d 283, 291 (5th Cir. 1977), *cert denied in relevant part sub nom. Alabama* v. *Pugh,* 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978). Visits by certain individuals may have a strong positive effect on an inmate's chances for rehabilitation and prevent deterioration of both mental health and important bonds to law-abiding citizens outside the walls. Restriction to a limited number of screened and approved non-relative visitors is allowable, as is restriction on the number of visits that each such person can have each month. Present regulations at the Canon Correctional Facility allow three non-relative visitors only when a prisoner does not have family in Colorado. The regulation is overly broad. Non-relative visitors should be allowed to visit those inmates who do have family in the state and should be allowed at least one visit during a reasonable span of time such as once a month. Approval of these visitors is subject to procedural safeguards such as notice of disapproval and an opportunity for review. *See Laaman* v. *Helgemoe,* 437 F.Supp. at 321, 330; *Hamilton* v. *Saxbe,* 428 F.Supp. at 1112-13.

The constitutional considerations regarding restrictions on correspondence are similar to those regarding visitation:

> First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad.

Procunier v. *Martinez,* 416 U.S. 396, 413-14, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224 (1974).

[39-42] General correspondence to and from inmates is subject to being read and inspected, but only according to specific and well-defined criteria and when accompanied by adequate procedural safeguards. *See Procunier v. Martinez,* 416 U.S. at 413-19, 94 S.Ct. 1800; *Guajardo v. Estelle,* 580 F.2d 748, 56-57 (5th Cir. 1978); *MacKinney v. De Bord,* 507 F.2d 501, 505 (9th Cir. 1974); *Hardwick v. Ault,* 447 F.Supp. 116, 128-30 (M.D.Ga.1978); and *Minnesota Civil Liberties Union v. Schoen,* 448 F.Supp. 960, 966 (D.Minn.1977). To be legitimate, "censorship" must focus *only* on matters which are important governmental concerns, such as interception of information concerning proposed criminal activity or encoded messages, and not on matters such as "magnify grievances,' " *Procunier v.*

Martinez, 416 U.S. at 415, 94 S.Ct. 1800, 1812, or that involve " 'improper language' or 'gossip,' " *Battle v. Anderson,* 376 F.Supp. 402, at 425, or that personally offend the censor. *Hardwick v. Ault,* 447 F.Supp. at 131. Not only are such concerns unjustified, but vague and general proscriptions invite too much discretion. Procedural safeguards require that an inmate be notified of the rejection of a letter written by given a reasonable opportunity to protest the decision, and that complaints be referred to a prison official other than the person who originally disapproved the correspondence. *See Procunier v. Martinez,* 416 U.S. at 418-19, 94 S.Ct. 1800; *Battle v. Anderson,* 376 F.Supp. at 425.[37] A notice that certain correspondence has been rejected must include a brief but adequate explanation, and the rejected correspondence must be returned to the sender. Regulations at the Canon Correctional Facility meet these standards.

With regard to receipt of publications through the mail, Canon Correctional Facility officials prohibit inmates from receiving periodicals and other materials that are not mailed directly from the publisher or an established vendor or distributor. This issue was recently addressed by the Supreme Court in *Bell v. Wolfish,* 441 U.S. at 548-52, 99 S.Ct. at 1879-81, 60 L.Ed.2d at 475-77, but the only rule that emerges from that decision is that 'a prohibition against receipt of hardback books unless mailed directly from publishers, book clubs or bookstores does not

[37]The scope of these protections include restrictions or censorship based on the identity or character of correspondents; the interested correspondent, as well as the inmate, must be given notice and provided the safeguards set forth above. *See Battle v. Anderson,* 376 F.Supp. at 425.

violate the First Amendment rights of . . . inmates." *Id.* 441 U.S. at 550, 99 S.Ct. at 1880, 60 L.Ed.2d at 476.[38]

[43] A recent Tenth Circuit decision is somewhat more general. In *Woods v. Daggett,* 541 F.2d 237 (10th Cir. 1976), the court of appeals upheld a publisher-only rule as applied to prisoners' receipt of published materials, finding that the rule met the standards set forth in *Procunier v. Martinez* and discussed above. *Accord, Guajardo v. Estelle,* 580 F.2d at 762.[39] The Canon Correctional Facility rule is allowable.

[44] Plaintiffs also attack two more particular restrictions on correspondence. The first is defendants' policy of refusing to deliver mail in a language other than English, and the second is a practice of limiting receipt of mail

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[38]Subsequent to the court of appeals decision, the Bureau of Prisons had amended its rule to permit the receipt of publications also from bookstores and proposed to amend the rule further to allow paperbacks and other soft-covered materials to be received from any source. *Bell v. Wolfish,* 441 U.S. at 549, 99 S.Ct. at 1879, 60 L.Ed.2d at 475. The question whether the original rule was constitutional was therefore not before the court.

[39]The specific publications involved in *Woods v. Daggett,* 541 F.2d 237 (10th Cir. 1976), were law books, access to which is entitled to greater protection than general reading material. Even so, the publisher-only rule was upheld.

The rule does not cause books and other materials to be limited to those which an inmate himself can afford. Relatives and friends can pay for and order books, including paperbacks, from publishers or established vendors and distributors, and have them delivered directly to the Canon Correctional Facility. CCF Regulation 302-18(12). Books are not counted against an inmate's package limit. *Id.*

I note, however, that unless adequate library facilities are soon provided for all inmates, I will reconsider this portion of my decision and order any additional relief that appears appropriate.

when certain correspondence would allegedly cause severe psychiatric or emotional disturbance to an inmate. As to the former, I have stated elsewhere that inmates do not forfeit the safeguards provided by equal protection. *See, e.g., Lee v. Washington,* 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968) (per curiam). A third of the population at Old Max is Hispanic and the English language rule seriously infringes protected First and Fourteenth Amendment interests without being necessary to any legitimate penological purpose. If prison officials are concerned that secret messages might be passed in Spanish, it is incumbent on a state with such a large Hispanic population to utilize a person capable of understanding Spanish to perform the censoring function or else forego it. The rule is unconstitutional.

[45] The second of the restrictions is not wholly unreasonable on its face, but the anomaly is that there is no qualified psychiatrist or psychologist at the prison to make a decision whether receipt of certain correspondence would cause severe psychological disturbance. Until such time as there is, the rule is void and may not be applied.

[46, 47] The constitutional rules are different where privileged correspondence such as mail to or from a court or attorneys involved. Outgoing privileged mail cannot be opened *at all, Guajardo v. Estelle,* 580 F.2d at 757-59; *Taylor v. Sterrett,* 532 F.2d 462, 473-78 (5th Cir. 1976), except on reasonable and specific cause to believe that contraband or improper communication is involved. *See, e.g., Taylor v. Sterrett,* 532 F.2d at 475; and *Hardwick v. Ault,* 447 F.Supp. at 129-130. General, undifferentiated suspicion is not sufficient cause, and such determination of cause and the interception of privileged mail will be subject to the same procedural safeguards as those regarding general correspondence. Apart from such exceptional circumstances, prison officials may take reasonable steps

to verify that addressed persons are in fact privileged correspondents, *see, e.g., Wolff v. McDonnell,* 418 U.S. at 576-77, 94 S.Ct. 2963, *Guajardo v. Estelle,* 580 F.2d at 758-59, so long as those steps do not cause unnecessary delay or interference with privileged mail.

[48] Incoming privileged mail is subject to inspection for contraband, *Wolff v. McDonnell,* 418 U.S. at 577, S.Ct. 2963, but only in the presence of the inmate. *See Guajardo v. Estelle,* 580 F.2d at 757-59; *Hardwick v. Ault,* 447 F.Supp. at 130; and Carty v. Fenton, 440 F.Supp. 1161, 1162-63 (M.D.Pa.1977).[40]

[49, 50] Defendants' regulations comply with these requirements except in two respects. First, the Canon Correctional regulation does not make clear that in those exceptional circumstances when outgoing privileged mail may be opened, it can only be opened in the presence of the sending inmate. Such presence is required. Second, in defining "legal mail," the regulations say that it is "any mail directed between an inmate and any public official or agency or any lawyer with respect to either his criminal conviction *or a complaint he might have concerning the administration of the prison under exceptional circumstances.*" CCF Regulation 302-18(6) (emphasis added). The latter qualification is not allowable. Legal mail is not subject to review as to the kind of problem or

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[40]By way of the same reasonable and specific cause set out above, incoming privileged mail in exceptional circumstances may be read in order to intercept improper communications, but only in the presence of the inmate. Any other communications are immune from censorship.

There is no evidence that gives me reason to doubt the good faith of defendants in this matter, but I mean for these rules and safeguards to be strictly applied. If bad faith or abuse of the allowed measures is shown, I will enter any additional orders that appear necessary to correct the situation.

complaint being asserted, or according to the degree or extent of such problem or complaint. Any mail to or from "a licensed attorney who is representing an inmate in a criminal or civil [or administrative] matter, is being contacted to represent or is contemplating representing an inmate in [any such matter]," CCF Regulation 302-18(6), is legal mail.

[51] It is beyond cavil that prisoners have a constitutional right to meaningful access to the courts, and that states have an affirmative obligation to assure such access. *See Bounds v. Smith,* 430 U.S. 817, 97 S.Ct. 1941, 52 L.Ed.2d 72 (1977); *Wolff v. McDonnell,* 418 U.S. at 577-80, 94 S.Ct. 2963; and *Younger v. Gilmore,* 404 U.S. 15, 92 S.Ct. 250, 30 L.Ed.2d 142 (1971) (per curiam). As the Supreme Court said in *Bounds v. Smith:*

> [T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.
>
> . . . . .
>
> It should be noted that while adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts, our decision . . . . does not foreclose alternative means to achieve that goal. Nearly half the States and the District of Columbia provide some degree of professional or quasi-professional legal assistance to prisoners. . . . Independent legal advisors can mediate or resolve administratively many prisoner complaints that would otherwise burden the courts, and can convince inmates that other grievances against the

> prison or the legal system are ill-founded, thereby facilitating rehabilitation by assuring the inmate that he has not been treated unfairly . . . . Nevertheless, a legal access program need not include any particular element we have discussed and we encourage local experimentation. *Any plan, however, must be evaluated as a whole to ascertain its compliance with constitutional standards.*

430 U.S. at 828-32, 97 S.Ct. at 1498-1500 (citations and footnotes omitted; emphasis added).[41]

Besides *Bounds,* the other important case in this circuit is *Twyman v. Crisp,* 584 F.2d 352 (10th Cir. 1978). In *Twyman,* the court of appeals said that a regulation allowing two hours a week in the law library had not been shown actually to prejudice the named plaintiff's access to the courts. The constitutional holding of the decision is not clear, however, since, while the appeal was pending, the regulation was changed to increase the library time to

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[41]The Supreme Court noted in *Bounds v. Smith* that correctional administrators have widely supported prison legal assistance programs:

> Nearly 95% of the state corrections commissioners, prison wardens, and treatment directors responding to a national survey supported creation and expansion of prison legal services . . . Almost 85% believed that the programs would not adversely affect discipline or security or increase hostility toward the institution. Rather, over 80% felt legal services provide a safety valve for inmate grievances, reduce inmate power structures and tensions from unresolved legal problems, and contribute to rehabilitation by providing a positive experience with the legal system.

430 U.S. 817, 829 n. 18, 97 S.Ct. 1491, 1499 n. 18, 52 L.Ed.2d 72 (1977).

an average of 11 and one-half hours a week. The court said, in addition to its conclusion above, that "[s]ince the rules have now been changed to provide considerably more time, this claim is without merit." 584 F.2d at 358. In *Bounds,* part of the approved library plan consisted of an average of one full day every three or four weeks, and this was acceptable when accompanied by other available types of assistance, such as trained inmate research assistants and typists. 430 U.S. at 819, 97 S.Ct. 1491.

[52] At the Canon Correctional Facility, the maximum number of inmates who may have access to the various law libraries on any given day is 13, totalling 65 for an entire week. Each would have library time of three hours or less. Wtih a population of *850* inmates, this would mean a law library capacity of three hours per inmate 13 weeks. It is fairly certain, of course, that not all inmates will be preparing legal materials at any one time, but even a considerably smaller number of inmate litigants would average only three hours of library time every four to six weeks.[42] That amount of time fails to meet even the two hour a week holding in *Twyman,* as well as the one full day every three to four weeks which the Supreme Court held sufficient in *Bounds.*

[53, 54] Once an inmate gains access to a law library, its contents must be constitutionally adequate. *See Bounds v. Smith,* 430 U.S. at 828, 97 S.Ct. 1491; *Battle v. Anderson,* 457 F.Supp. 719, 736 (E.D.Okl.1978); and *Gilmore v. Lynch,* 319 F.Supp. 105, 111 (N.D.Cal.1970), *aff'd sub nom. Younger v. Gilmore,* 404 U.S. 15, 92 S.Ct. 250, 30

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[42]Sign-up for library times is on a first-come, first-served basis, except that there is a exception for inmates facing court deadlines.

In addition, prison regulations provide that legal materials cannot be "checked out" or removed from the libraries.

L.Ed.2d 142 (1971) (per curiam). The small libraries in cellhouses 3 and 7 are totally inadequate for effective researching and framing of issues. The general population library, while more extensive than the collections in cellhouses 3 and 7, is still inadequate. It contains only half of the volumes recommended by the American Association of Law Libraries Committee on Law Library Services to Prisoners.

[55-57] Plaintiffs also complain about lack of typewriters and inadequate access to photocopy equipment. Since prisoners are not prejudiced by the filing of handwritten documents, there is no constitutional right to typewriters. *See Twyman v. Crisp,* 584 F.2d at 358; *Stubblefield v. Henderson,* 475 F.2d 26, 26 (5th Cir. 1973). *Also see Wolfish v. Levi,* 573 F.2d 118, 132 (2d Cir. 1978), *rev'd on other grounds sub nom. Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). I have not been able to find a case which holds that inmates have a constitutional right of meaningful access to photocopy equipment, but given serious restraints on library time and a rule that prohibits inmates from taking legal materials out of the library, adequate access to a photocopy machine may be called for. As set forth in *Bounds v. Smith,* the question in any particular case is whether a prison's facilities and rules, taken as a whole, provide inmates with meaningful access to the courts. The Canon Correctional Facility's do not.[43]

[58, 59] "States must shoulder affirmative obligations to assure all prisoners meaningful access to the courts." *Battle v. Anderson,* 457 F.Supp. at 736. I have previously

[43]It is also clear that prison officials must provide access to a notary, and not interfere with legal and official mail, except for a limited inspection for contraband as set out above. *See Bryan v. Werner,* 516 F.2d 233 (3rd Cir. 1975).

quoted this decision regarding access in holding that "[t]o be meaningful, the right of access to the courts must include the means to frame and present legal issues and relevant facts effectively for judicial consideration." *Mingo v. Patterson,* 455 F.Supp. 1358, 1361 (D.Colo.1978). It is not required that a penitentiary even have a law library if the state should choose some other means of insuring access. Thus, a state could provide counsel through its public defender system or it could contract with an agency or foundation or law school to provide this service. Here, however, defendants have apparently opted to provide law libraries and inmate assistance. While there are indeed serious and well founded criticisms of the use of this option, it is still constitutionally permissible if minimum standards are met in provisioning the law libraries with adequate books and materials and in maintaining constant vigilance to assure that inmate assistance is neither inadequate nor incompetent. Generally speaking, it takes considerable skill, money and time to maintain an adequate functioning law library. The law libraries at Old Max fall below any known acceptable standards. While it is entirely within the province of the defendants to opt for the law library and inmate legal assistance means of providing access to the courts, the wisdom of choosing it when othermore efficient and less expensive means are available is indicative of the environment in which constitutional violations abound.

ORDER

The defendants have not attempted to defend by asserting that plaintiffs' constitutional rights have not been violated. The defense is something in the nature of confession and avoidance. Defendants admit, or concede, that significant violations have existed at least since the mid-1970s. They have argued, instead, that Colorado has made substantial and goof faith efforts to resolve what

they describe as problems and what I call violations of law. It is not only the constitution and federal law which defendants have violated. There is a veritable litany of state laws and regulations which have been and are being violated.[44]

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[44]The State of Colorado has violated or failed to pursue the requirements of its own laws set forth in the following statutes or regulations: C.R.S. §§ 15-8-101 *et seq.* (1978), governing procedures to be followed in dealing with persons found incompetent or insane; C.R.S., § 16-11-308(3) (1978), requiring that a recommendation be made by the executive director of the department of corrections as to the place of confinement or rehabilitation program which is the most likely to result in the maximum rehabilitation of an offender; C.R.S. § 17-20-115, 117 (1978), requiring that each inmate perform labor most suitable to his capacity, and most advantageous to the needs of the state, and that he be paid for his labor. C.R.S. §§ 17-40-102, 103(1) (1978), defining procedures to be followed in dealing with mentally ill or retarded prisoners; C.R.S. §§ 17-24-101 *et seq.* (1978), providing rules, regulations, and procedures for the division of correctional industries which provides jobs and other work activities for offenders; C.R.S. § 24-90-107 (1973), requiring the state librarian to furnish library services to penal institutions. C.R.S. § 25-1-304(1)(d) (1978), calling for cooperation between the division of alcohol and drug abuse and the department of corrections in establishing and conducting programs for the prevention of alcoholism and treatment of alcoholics in corrections institutions; Rules and Regulations Governing Sanitation in Barber Shops in Colorado; 6 CCR 1011-1, setting forth applicable community clinic and emergency medical care requirements such as clinical and emergency services and psychiatric care; 6 CCR 1009-1, providing regulations pertaining to communicable diseases; and C.R.S. § 25-5-303 (1973), prohibiting the reuse of any bedding material used by a person having an infectius or contagious disease.

Obedience to law is a two-way street. While I suspect that a number of people have little sympathy for individuals who have violated the law and been convicted and sentenced to confinement at the Canon Correctional Facility, the state of Colorado and its officials are under no less an obligation to obey both state and federal law. Our system of justice does not have room for the double standard that the acts and omissions of defendants suggest. Nor does it recognize lack of funding as a defense.

[60, 61] Defendants argue that they have made "wrenching" good faith efforts to correct the violations which exist. The evidence does not support the defense. Further, it is well-established that good faith efforts, even wrenching ones, are not a defense to equitable relief from constitutional violations. Nor is lack of financing. The trial court in *Battle v. Anderson* answered these same arguments:

> This Court is well aware of the financial restraints placed on the Defendants and their efforts to comply with the Constitution. But the good will shown by the Defendants cannot served as a defense. *Finney v. Arkansas Board of Correction, supra; Rozecki v. Gaughan* [1 Cir., 459 F.2d 6], *supra; Holt v. Sarver,* 309 F.Supp. 362, 385 (E.D.Ark.1970); and *Davis v. Lindsay,* 321 F.Supp. 1134, 1139 (S.D.N.Y.1970). Nor is the lack of financing a defense to a failure to provide minimum constitutional standards. *Jackson v. Bishop,* 404 F.2d 571, 580 (8th Cir. 1968); *Finney v. Arkansas Board of Corrections, supra* at 199; *Alberti v. Sheriff of Harris County, Texas, supra* [D.C., 406 F.Supp. 649], at 669; and *Hamilton v. Love, supra* [D.C., 328 F.Supp. 1182], at 1194. If the State of Oklahoma wishes to hold the inmates in institutions, it must provide the funds to maintain the inmates in a constitutionally permissible manner.

447 F.Supp. at 526. The Tenth Circuit not only affirmed the trial court's order, but specifically agreed that even "significant progress" by Oklahoma was not a defense to continuing constitutional violations.

> We agree with the Trial Court finding, that while the State of Oklahoma has made signifi-

> cant progress in correcting many of the abuses and/or providing for new or additional facilities, personnel and programs within its penal system, still the State has not prevented the degenerated . . . conditions which have come to pass at the Oklahoma State Penitentiary at McAlester and at the Oklahoma State Reformatory at Granite.

564 F.2d at 402. Other courts have agreed. *See, e.g., Smith v. Sullivan,* 53 F.2d 373, 378 (5th Cir. 1977); *Gates v. Collier,* 5 Cir., 501 F.2d 1291, at 1319-20; *Rozecki v. Gaughan,* 459 F.2d 6, 8 (1st Cir. 1972); *Doe v. Lally,* 467 F.Supp. at 1351; *Palmigiano v. Garrahy,* 443 F.Supp. at 985; *Pugh v. Locke,* 406 F.Supp. at 330-31; and *Holt v. Sarver,* 309 F.Supp. at 385. As I said in ruling from the bench, the Constitution does not permit cruel and unusual punishment today on the theory that somewhere down the line it might be corrected. To quote from Judge Henley's landmark decision in *Holt v. Sarver,* 309 F.Supp. at 383, "[t]he handwriting is on the wall, and it ought not to require a Daniel to read it."

A number of other themes have been presented by the defendants which require some comment. The first, and most frequently recurring, is that the state has spent significant sums for the construction of new maximum and close security facilities designed in accordance with the most enlightened concepts known to date. First, however, a future facility does nothing to eliminate present violations. Second, the proposed facility will not increase the capacity of state correctional facilities. There has been no showing that the present or proposed facilities are adequately staffed; that the staff is adequately trained; that staff training will continue; that adequate health services will be provided; that idleness will be eliminated or that organization will permit personnel to comply with stated job responsibilities without interferences or futility. Indeed, the meager evidence presented on these points sug-

gests that the new facilities may very well aggravate rather than mitigate the problems which presently exist.

The second theme which defendants have offered is that they have had to make choices under very restrictive conditions. Defendants assert that they have employed a utilitarian calculus to obtain maximum results from limited resources. Thus, defendants say that they have concentrated their efforts and resources on the places where such would accomplish the most. Defendants directed these efforts and resources to minimum security and medium security institutions, since these institutions require less resources and successful results are more easily realized. The decision may indeed be described as rational and intelligent, but it was made at a cost which cannot be accepted. The decisions obviously did not include consideration of the quintessential question which all republican governments must address; that is, does the constitution permit or prohibit this course of action? The utilitarian calculus does not provide a means by which that question may be answered. Instead of giving proper consideration to the rights of individuals, the decision was harnessed to a balance sheet. The results of this process are there for everyone to see. Indeed, if the Colorado Department of Corrections were Dorian Gray, the Canon Correctional Facility would be its portrait.

In granting relief for violation of prisoners' constitutional rights, courts have taken a number of approaches. Some have entered comprehensive orders, detailing their requirements and setting up timetables for compliance. *See, e.g., Pugh v. Locke,* 406 F.Supp. at 331-32, *modified in relevant part and remanded sub nom. Newman v. Alabama,* 559 F.2d at 290; *Jones v. Wittenberg,* 73 F.R.D. 82 (N.D.Ohio 1976). *Also see Jones v. Wittenberg,* 440 F.Supp. 60 (N.D.Ohio 1977). In *Palmigiano v. Garrahy,* 443 F.Supp. at 986-89, the district court entered a com-

prehensive order and mandated that the unconstitutional facility be closed within one year. The court appointed a special master to file monthly reports and gave him extensive authority to oversee and implement compliance, including the authority to recommend staff hiring and transfers. Judge Johnson, faced with repeated delay and recalcitrance in *Newman v. Alabama,* 466 F.Supp. 628, 635-39 (M.D.Ala.1979), appointed the governor of Alabama as receiver for the prison system and transferred all corrections' responsibilities and functions directly to the governor's office.

[62] Still other courts have ordered population reductions in overcrowded prison facilities, *see, e.g., Battle v. Anderson,* 447 F.Supp. at 526, *aff'd,* 564 F.2d at 398-403, while others have ordered institutions to be closed. *See, e.g., Battle v. Anderson,* 457 F.Supp. at 738-39; *Palmigiano v. Garrahy,* 443 F.Supp. at 986; and *Gates v. Collier,* 407 F.Supp. 1117, 1122-23 (N.D.Miss.1975), *aff'd and remanded,* 548 F.2d 1241 (5th Cir. 1977). In *Hutto v. Finney,* 437 U.S. 678, 687-88, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), the Supreme Court recently affirmed the broad equitable power of lower federal courts to remedy continuing constitutional violations, especially where defendants have had repeated opportunities to resolve the problems themselves. The court recognized the interdependency of many prison violations and held that the comprehensive order entered by the district court was justified.

These remedies are available should they become necessary. In the first instance, however, most courts have provided state defendants with an initial opportunity to put their own house in order by presenting a plan that assures immediate attention to bringing a corrections system into constitutional compliance. *See, e.g., Doe v. Lally,* 467 F.Supp. at 1354-55; *Holt v. Sarver,* 442 F.2d

304 8th Cir. 1971). While this is the first adjudication of large-scale constitutional violations at the Canon Correctional Facility, there is a substantial history of recognized problems and inadequate attention, even indifference, to them, notwithstanding humanitarian efforts by some state officials. None of these problems are recent ones. The institution has been studied again and again, and each of these studies has found serious deficiencies. Still another study is not an adequate response. Delay will not be accepted.

No one seriously suggests that prisons should be a desirable place to be. They exist to confine *as punishment* those who have violated the criminal law. Still, as the court of appeals said in *Battle v. Anderson,* 564 F.2d at 403:

> While neither this Court nor the District Court holds to the proposition that prisoners subjected to the punishment of incarceration are entitled to the rights and privileges of one who has not committed a crime against person or property crying out for retribution, still the infliction of cruel and unusual punishment cannot be countenanced in an orderly society. While the rights and privileges necessarily lost – and, in effect, surrendered – by prisoners in punishment for crimes committed are many and varied, they cannot be denied all rights and privileges.

It is abundantly clear that the plaintiff class has suffered from pervasive and frequent violations of federally protected rights. It is uncontradicted by any evidence that Old Max is unfit for continued human habitation. It is established by clear and convincing evidence that members of the plaintiff class have suffered denials of due process and the infliction of cruel and unusual punishment as a

result of some of defendants' practices and procedures and many of defendants' omissions. Accordingly, it is

ORDERED that Old Max shall be closed. It will no longer be used to confine inmates either temporarily, permanently or on a standby basis. Defendants herein are forever enjoined from confining members of the plaintiff class in the Canon Correctional Facility. It is further

ORDERED that execution of this order shall be stayed for a period of forty five (45) days from the date hereof subject to the following conditions:

1. Defendants must take immediate and continuing steps to cease and desist from maintaining conditions which violate federal and state law and which have been discussed or referred to in this opinion and any of its footnotes.

2. Defendants must present a detailed plan which sets forth the means by which the plaintiff class will be forever protected from further violations of their Eighth and Fourteenth Amendment rights. Such plans must be in furtherance of, but not necessarily limited to the following principles:

a. The Principle of Productive Activity. The selection of programs and the kinds of activities to be used are matters for the defendants to determine. Jobs, recreation, treatment, education, labor and training may all be used to achieve this end. The object is to eliminate forced idleness. Each inmate, including those in the Diagnostic Unit, must be involved in some kind of productive activity at least 8 out of every 24 hours.

b. The Principle of Motility. Excessively restrictive confinement is cruel and unusual punishment. No prisoner, including those in the Diagnostic Unit, may be housed in less

than 80 square feet for 20 or more hours a day. If the confinement space decreases from 80 square feet, the hours of confinement therein must be reduced proportionately.

c. The Principle of Health. Mental and physical health must be maintained. Treatment and medication, nutrition, exercise and access to others must be provided without delay, without interference by nonmedical personnel and at a level equal to the present state of medical art. Preventive medicine and therapy may not be withheld if such would cause or permit deterioration. The environment and food preparation and delivery must meet existing Colorado Health Department standards.

d. The Principle of Integrity and Safety. This principle is directed toward the reduction of stress. Guards and staff may not be worked beyond endurance either because of extensive work hours or insufficient personnel to accomplish needed tasks with due attention to the responsibility to treat inmates fairly and protect them from harm.

e. The Principle of Coherence. This principle means that any systems of classification, placement and assignment must be clearly understandable, consistently applied and conceptually complete. Methods of validation must be implemented and means of redress for irregularity must be provided.

[63] In sum, if defendants wish to obtain relief from this order of closure, they must take immediate steps to provide the plaintiff class, including those in the Diagnostic Unit, with the basic human needs which I have discussed. I believe this is the least intrusive action I can take. It is up to defendants to plan and implement programs. it is up to me to make sure that such programs meet constitutional minima.

If defendants continue to desire relief from this order, I will consider further stays upon a showing that defendants are proceeding without delay in accordance with the principles I have set out and upon a further showing of what steps will be taken during the ensuing stay of execution. It is further

ORDERED that the injunction ordered herein is considered to be a claim separate and apart from other claims, including those for costs and attorneys' fees, within the context of Rule 54(b) of the Federal Rules of Civil Procedure. There being no just reason for delay, the Clerk of the Court is instructed to enter this Memorandum Opinion and Order forthwith as Judgment in order to make this order immediately appealable. This Memorandum Opinion and Order is no way stays, modifies or amends those emergency orders which I made in my bench ruling. The emergency orders remain in full force and effect and will be treated as such.

ORDER

KANE, Judge.

ON MOTION FOR STAY OF EXECUTION

This case is before me on a number of motions, the most important of which is the defendants' motion for a stay of execution pending the appeal of this court's order of December 20, 1979. The other motions are to vacate an existing order staying execution and to compel discovery.

On November 15, 1979, after five weeks of trial, I determined that conditions at the State of Colorado's maximum security prison violate prisoner's federal constitutional rights, as well as a substantial number of state laws. Several bench orders were issued directing immediate attention to certain emergency matters, primarily in the area of health care. On December 20, 1979, this bench ruling was supplanted by a 75 page memorandum opinion and order that sets out the findings of fact and conclusions of law reached in this case. In granting relief to the plaintiff class, I ordered that "Old Max shall be closed," subject to a 45 day stay of execution in order for defendants to come forward with a detailed plan outlining the good faith efforts that defendants will undertake to remedy the violations proven at trial. The order expressly states that further stays will be considered so long as defendants continue with good faith efforts to correct conditions which violate the Constitution of the United States and the laws of the State of Colorado. On December 26, a hearing was held at which all parties were present. At the hearing the December 20 order was explained several times. On December 28, the defendants filed a notice of appeal.

The defendants' proposed plan was due to be filed on February 4, 1980. On January 31, a status conference was

held in chambers at which time defendants indicated that their report would be filed according to the February 4 schedule. Defendants also indicated that they would file a motion for stay pending appeal. Counsel for plaintiffs said that they would need time to review the plan and that they might request a limited amount of discovery regarding the proposed action. I indicated that any immediate motions would be set for hearing at the end of the week of February 4, and that a hearing on defendants' proposals would be set no later than March 11, 1980.

On February 4, the day the plan was due, defendants moved for a one-day extension of time because of the breakdown of a computer involved in the plan's preparation. The request was granted, and on February 5, defendants filed their proposed plan of action and a motion for stay of further proceedings pending appeal. Plaintiffs filed a motion for expedited discovery on the same day, as they had indicated was likely at the status conference a few days earlier. I granted this motion on February 6, and on the same day, extended the stay of execution pending further order, so that counsel for plaintiffs and I would have time to review defendants' proposed plan of action. Other events have occurred since this order of February 6, but are better understood in the context of the discussion which follows.

A hearing was held on the pending motions on February 13. The hearing was required because the defendants' motion for a stay pending appeal simply failed to comply with the requirements of Rule 62 F.R. Civ.P. During the hearing I attempted, with minimal success, to find out the specific grounds for appeal. For instance, the defendants alleged that I made findings unsupported in the record. When asked to specify I was told that the trial transcript was unavailable and no examples could be given. Whether this is a violation of Rule 11 F.R.Civ.P. I leave undecided.

In any event I shall consider the representations of counsel at the February 13 hearing as well as the printed pages of the motion. The memorandum opinion and order filed on December 20, 1979 is 75 pages long. Repetition of its findings and conclusions is neither appropriate nor necessary. There is nonetheless an apparent need for further clarification of several matters so reference will be made to that memorandum opinion and order throughout this order.

[64] It is singularly important to observe that here the defendants seek a stay of proceedings pending their appeal of the judgment entered on one claim among many and which I certified in accordance with Rule 54(b) F.R.Civ.P. In order to rule on this motion for stay I must consider four factors: 1) whether defendants have shown that they have a *substantial* likelihood of prevailing on the merits of the appeal; 2) whether defendants have shown *irreparable* injury if the stay is not granted; 3) whether a stay will *substantially* harm the other parties to the litigation; and 4) whether the public interest is best served by granting or denying the stay. *See Battle v. Anderson,* 564 F.2d at 397.

I.

WHETHER DEFENDANTS HAVE SHOWN THAT THEY HAVE A SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THE MERITS OF THE APPEAL

A. ABSTENTION

Defendants argue that I should have abstained from deciding this action pending the outcome of certain state proceedings. The argument was first raised by way of motion on April 7, 1978. After briefing by the parties and oral argument, the motion was denied on May 17, 1978. The argument is the same now as it was then.

[65] It is fundamental that a party having a federal constitutional claim is normally entitled to have that claim determined in a federal forum. As Judge Murrah said in *Stapleton v. Mitchell,* 60 F.Supp. 51, 55 (D.Kan.1945).

> We yet like to believe that wherever the Federal Courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.

See Zwickler v. Koota, 389 U.S. 241, 248, 88 S.Ct. 391, 395, 19 L.Ed.2d 444 (1967) and *McNeese v. Board of Eduction,* 373 U.S. 668, 674 n. 6, 83 S.Ct. 1433, 1437, 10 L.Ed.2d 622 (1963) (quoting Judge Murrah with approval). As the Tenth Circuit recently said in *Clappier v. Flynn,* 605 F.2d 519, 528 (10th Cir. 1979), in another Eighth Amendment case:

> It is well settled, of course, that if the actions of [state officials] result in a deprivation of a federally protected right, the existence of an adequate state remedy does not bar recovery under 42 U.S.C. Sec. 1983. See: *Egan v. Aurora,* 365 U.S. 514, 81 S.Ct. 684, 5 L.Ed.2d 741 (1961). The 'federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.' *Monroe v. Pape,* 365 U.S. 167, 183, 81 S.Ct. 473, 482, 5 L.Ed.2d 492 (1961), *overruled in part, Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

[66] Abstention is not a matter of jurisdiction, but of trial court discretion. *See Western Food Plan, Inc. v. J. D.*

MacFarlane, 588 F.2d 778 (10th Cir. 1978). A number of federal courts have found that abstention was not warranted in prisoners' rights litigation, and retained jurisdiction; *See, e.g., Procunier v. Martinez,* 416 U.S. 396, 400-04, 94 S.Ct. 1800, 1805-07, 40 L.Ed.2d 224 (1974); *McRedmond v. Wilson,* 533 F.2d 757, 760-64 (2d Cir. 1976); *Taylor v. Sterrett,* 499 F.2d 367, 368 (5th Cir. 1974), *cert. denied,* 420 U.S. 983, 95 S.Ct. 1414, 4 L.E.2d 665 (1975); *Jones v. Metzger,* 456 F.2d 854, 856 (6th Cir. 1972). The only recognized abstention doctrine that defendants raise in their motion is *Pullman* abstention. At the hearing, defendants also mentioned the abstention doctrine arising in *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and subsequent cases. Neither are applicable here.

[67, 68] The primary purpose of the *Pullman* doctrine is to avoid the unnecessary determination of federal constitutional questions. *See Railroad Commission v. Pullman,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). The requirements for the doctrine to apply are as follows:

> The Court must determine (1) whether the state law is unclear and, if it is, whether the state court resolution of the unclear state issue will obviate or modify the federal constitutional issue, and (2) whether the costs of abstention are too great in a particular case where there is some other aspect of the case in favor of or against abstention.

1A (Part 2) J. Moore, *Moore's Federal Practice* ¶ 0.203[1], at 2115 (2d. ed. 1977).

[69] The second doctrine is found in *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) and *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975) which I will refer to as the *Younger*

doctrine. It is concerned with the avoidance of the use of federal courts as a means of collateral attack on enforcement actions brought by a state government in its own courts.

[70] Defendants' argument is based on the fact that certain actions were pending in the state courts at the time of their motion. These were *Morrison v. Lamm,* Civil Action No. C-66722, in the District Court in and for the County of Denver, State of Colorado, filed on September 15, 1976; *Johnson v. Leidig,* Civil Action No. C-69544, also in the Denver District Court, Amended Complaint filed on August 22, 1977; and *Duran v. Lamm,* Civil Action NO. 78438, Denver District Court, filed on or around April 11, 1978. The action here was commenced on November 30, 1977. Defendants argue that these state actions presented a number of issues similar to those in this action, and that this court should have abstained while those actions were decided. While the argument has little or nothing to do with *Pullman* or *Younger* abstention, a review of the state actions shows that abstention, in whatever form, was not appropriate. First and generally, none of these actions was initiated by the same plaintiffs. While one, *Morrison v. Lamm,* was initiated with class certification in mind, no class had been certified when defendants' earlier motion was made. The other two actions were solely individual claims by particular plaintiffs. As I will discuss below the track record of the defendants does not justify an assumption that anyone other than the named individuals might benefit from decisions in those cases.

In *Morrison,* the only issue present at the time of this court's denial of defendants' motion was whether the State of Colorado could administratively segregate inmates who had not been charged with any specific violation of law or prison rule and at the same time refuse to allow those inmates to earn good time. While the conditions of confine-

ment in administrative segregation have been litigated in the present action, the issue in *Morrison* was neither presented nor decided by this court. In *Johnson v. Leidig,* a single plaintiff alleged that he was receiving inadequate mental health care, in violation of both the federal constitution and state law. Again, while the decision in this case clearly addresses the adequacy of mental health care at Old Max, it does so on a system-wide basis. The decision was not precluded by an individual complaint being asserted in a pending state proceeding.

Finally, *Duran v. Lamm* was not pending at the time the present action was filed, but was commenced afterward. A review of that complaint does show substantial similarity with the issues presented here. The action was commenced by two individual plaintiffs then confined in the Denver County Jail who sought to enjoin their transfer back to Old Max, at least so long as its alleged problems continued to exist. That subsequent action could not preclude plaintiffs here from their choice of a federal forum. If anything, the contrary might have been true; that is, the plaintiffs in *Duran* might have been expected to rely for relief on the class action here. They apparently found that option less attractive, since they were not then present at Old Max and did not want to return.

Defendants do not indicate how the above facts relate to an argument for *Pullman* abstention. The only authority they cite is *Smith v. State of Kansas,* 356 F.2d 654, 656 (10th Cir. 1966), *cert. denied,* 389 U.S. 871, 88 S.Ct. 154, 19 L.Ed.2d 151 (1967), *rehearing denied,* 389 U.S. 1010, 88 S.Ct. 567, 19 L.Ed.2d 612 (1967), a case dealing with the exhaustion requirement in habeas corpus proceedings and having nothing to do with abstention. They do not assert that the state actions would have resolved unclear questions of state law that would have obviated the need to decide a federal constitutional question. It is clear that

plaintiffs' action here, while including pendent state claims,[1] is primarily concerned with federal constitutional law. At the very most, resolution of some state law issues would not have caused the action here to disappear, even though defendants may have wished it so.

The single part of my decision to which *Pullman* might arguably apply is the conclusion that Colorado law requires that all able-bodied prisoners be put to work at some employment. But that hardly seems an "unclear" matter of state law. The Colorado statute at C.R.S. § 17-20-117 (1978), expressly states: "Every able-bodied offender shall be put to and kept at the work most suitable to his capacity and most advantageous to the people of this state." *Also see* C.R.S. §§ 17-20-115, 17-24-102(1) (1978). The language is clear on its face and consistent with declarations of the legislature's purpose. *See* Memorandum Opinion and Order, December 20, 1979, at 52. In such cases, abstention is not required. *See Zablocki v. Redhail,* 434 U.S. 374, 379 n. 5, 98 S.Ct. 673, 677, 54 L.Ed.2d 618 (1978); *Procunier v. Martinez,* 416 U.S. 396, 400-04, 94 S.Ct. 1800, 1805-07, 40 L.Ed.2d 224 (1974); *Wisconsin v. Constantineau,* 400 U.S. 433, 437-39, 91 S.Ct. 507, 510-11, 27 L.Ed.2d 515 (1971); *United States v. Bureau of Revenue of State of New Mexico,* 291 F.2d 677, 679-80 (10th Cir. 1961). Nor is this the sort of state law question that, if resolved, would have precluded the action here.

The *Younger* doctrine clearly does not apply. As the summary of the state proceedings indicates, this is not a case where a defendant in a state enforcement action has sought to enjoin such action in federal court.

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[1] Jurisdiction of such claims is clear. *See, e.g., Taylor v. Sterrett,* 499 F.2d 367, 368 (5th Cir. 1974); *Palmigiano v. Garrahy,* 443 F.Supp. 956, 980 (D.R.I. 1977), *appeal dismissed,* 599 F.2d 17 (1st Cir. 1979).

B. FINDINGS AND CONCLUSIONS

Defendants contest the court's findings and conclusions, but they have not presented any evidence or authority which suggests that those findings or conclusions should be otherwise. In fact, they have not even indicated which of those findings and conclusions they contest. In short, there is nothing in the motion but the bare assertion that defendants believe that I am wrong. It is an exercise in *ipse dixit.*

C. CLASS CERTIFICATION

[71] The other grounds which defendants assert make it likely they will succeed on appeal are even more ephemeral. It is suggested that I acted without jurisdiction, but I believe the congress has given me jurisdiction in 1983 cases. Defendants assert error in the certification, scope and definition of the plaintiff class. No argument is given in support of this assertion and I think I know why. First it is absurd since the certification meets every known standard. Second, the first eight pages of my memorandum opinion and order make it abundantly clear why consolidation and class action treatment of prisoner cases in this district is absolutely essential to administration of the court's business. Third, as previously stated, the track record of defendants is not favorable in this area. In *Romero v. Schauer,* 386 F.Supp. 851 (D.Colo.1974), a three-judge court, consisting of Judges McWilliams, Arraj and Winner, established the due process and equal protection rights of state hospital patients regarding transfers to the state penitentiary upon an administrative determination that they are too dangerous to continue to be confined at the state hospital. Evidence in this case, especially regarding Darrell Howell, shows that these rights have not been observed. In *Gurule v. Wilson,* Civil Action No. 74-A-926 (D.Colo.Apr. 3, 1978), Judge Arraj determined the pro-

cedural due process rights of Colorado prisoners regarding their regressive classification and transfer to more restrictive cellblocks. Because the suit was not certified as a class action, it appears that the state defendants-extended the procedural rights to the named plaintiffs and then returned to business as usual. That situation has caused another lawsuit to be filed in this court, *Marioneaux v. Colorado State Penitentiary,* Civil Action No. 78-K-1065 (D.Colo. Oct. 12, 1978), which has been certified as a class action. It is an exact reprise of *Gurule* and a preliminary injunction has been entered. *See* 465 F.Supp. 1245 (D.Colo.1979). When the substantial and continuing history of constitutional violations at the state prison, the consistent need for continued jurisdiction in other prison cases, and the state's own track record are viewed together, I find that class action treatment is more than warranted.

D. THE REMEDY

Defendants also seek reversal of the remedy. This assertion is truly the most astonishing of all. As stated in the memorandum opinion and order, the five week trial was most notable for the lack of objections and the almost total absence of conflict in the evidence. Of course I attached certain conditions to the order of closure which were not asked for, but which I believe are minimal and the least intrusive conditions yet imposed to my reckoning on any state defendant in a prison conditions case. If indeed, I was in error it was on the side of restraint. All that the remedy requires, in essence, is that the state develop its own plans and make good faith immediate and continuing efforts to implement those plans so that the numerous constitutional violations set forth in my memorandum opinion and order will neither be repeated nor advanced. This is the proceeding which defendants wish me to stay!

In order to reach this position defendants have confused and confounded my opinion and order of December 20,

1979 to the extent that I think amounts to recalcitrance. From that time to the present, defendants have persisted in reading three sentences out of context. They continue in the present motion for stay in which they quote: "ORDERED that Old Max shall be closed. It will no longer be used to confine inmates either temporarily, permanently or on a standby basis. Defendants herein are forever enjoined from confining members of the plaintiff class in the Canon Correctional Facility." (Motion for Stay, at 2.) The order was repeatedly explained at the December 26 hearing, apparently to no avail. No one except defendants appears to have had such difficulty understanding the order.

First, the order says that Old Max "shall" be closed, not that it is closed. It is clear that Old Max will be closed when the new facilities become available. That is not only conceded, but in fact desired, by the state's correctional officials. It is the precise ruling which they requested. Whether Old Max is closed before that time is completely up to the willingness of defendants to make good faith efforts to bring the prison into compliance with the federal constitution. The order makes that abundantly clear.

While defendants recognize that a 45 day stay of execution immediately followed this part of the order, they continue to act as if the order means that the prison will be automatically closed on the expiration of the 45 days. Again, whether closure occurs is up to defendants. I did not anticipate at the time of the order that such closure would be called for. I still do not and, even if I did order closure, defendants would have the right to seek a stay of execution of that order in the Court of Appeals. At best the present request is premature and at worst it is a bugaboo. Defendants were directed to come forward during the period of the stay with a good faith plan "that assures immediate attention to bringing [the] corrections system into constitutional compliance." The order states

that upon presentation of such a plan, the stay would be extended and that further stays would be considered "upon a showing that defendants are proceeding without delay in accordance with the principles I have set out and upon a further showing of what steps will be taken during the ensuing stay of execution." The remedy is hardly "draconian" as asserted in defendants' motion.

Defendants complain that I have intervened too much, that I have taken over the supervision of the prison. That could not be further from the truth. From page one of the December 20 decision, I expressed a great measure of deference toward state officials, and made it clear that I hae no intention of running the prison. The order is hardly a catalog of things to do and when to do them. Maximum latitude is afforded to the state's prison officials. The irony of defendants' allegations is that they also complain that I have not *sufficiently* told them what they have to do. The order is a public document that all are entitled to review. If it amounts to running the prison, the prisons require no personnel.

The defendants have complicated our present situation since they expressly tell me that the plan which they have submitted is not the plan which this court requested. The motion for stay says at page 16:

> What must be kept uppermost in mind, however, is that this plan is not the compliance plan contemplated by the court at page 73 of its order, but is independent from that plan and is presented to set forth the continuing good faith of the state and to indicate that the public interests demands that such a plan be implemented free of court interference. e.g., compliance hearings.

On February 7, following the order of February 6 which

extended the stay to allow time to review defendants' plan, defendants filed a motion to vacate the stay. Again they indicated that the plan was not prepared as the good faith proposals requested by the court.

> 2. Both the plaintiffs' motion [to allow discovery] as well as the court's order mistakenly characterized the report filed with the court on February 5, 1980 as "a report setting forth (the defendants') proposal for compliance" which is in fact contrary to what in fact was filed with the court on February 5, 1980 (see defendants' motion for stay of proceedings pending appeal pursuant to Rule 62, Federal Rule Civil Procedure at page 16).
>
> 3. At no time did the defendants represent that any plan that would be filed with the court would be the plan of compliance referred to in the judge's order of December 21, 1979 at page 73.

The plan was nonetheless prepared after this court's bench ruling of November 15, 1979, as demonstrated by the following paragraphs of defendants' own motion:

> 10. The Colorado Medical Society Committee on Correctional Health Care and Jails is presently meeting to provide general evaluation of the medical care available at CCF and what that society can do to improve such care.
>
> . . . . .
>
> 26. The Department of Corrections has organized 13 task forces to study and evaluate the problems defendants have identified within CCF (see attached exhibit E). Those task forces have expended 4,135.25 man hours *since December*

> *15, 1979. As a result of the concentrated efforts of the task forces,* a plan of action of the Department of Corrections has been formulated and submitted to the Colorado Legislature (see attached DOC plan of action). The plan calls for the *immediate* hiring of 77.4 additional fulltime employees . . . .
>
> 27. The DOC's *new* "Mission Statement" for the treatment of offenders is contained in DOC regulation 102-7, *dated December 3, 1979* (see exhibit F).

(Motion for Stay, at 10, 14-15; emphasis added.)

A careful review of the 97 page plan shows that is was obviously prepared by knowledgeable corrections officials in a good faith effort to comply with the December 20 order and then sanitized by counsel to meet the appetites of this rather turgid argument.

The vast majority of the steps that defendants have taken or propose to take are in direct response to problems identified in my bench ruling and my written order, as demonstrated by the following paragraphs of defendants' motion:

> 1. *On January 1, 1980,* George S. Williams, M.D., was hired as the fulltime staff physician at CCF . . . .
>
> 4. The department is presently advertising and interviewing applicants for two registered nurse positions within the infirmary . . . .
>
> . . . . .
>
> 7. Dr. John Barnard, an orthopedic surgeon, has indicated a willingness to take on all of the

> CCF orthopedic patients on a case-by-case basis . . . .
>
> . . . . .
>
> 9. The department is currently searching for a fulltime psychiatrist to be employed at CCF . . . .
>
> . . . . .
>
> 11. Two (2) 1978 Chevrolet Impala station-wagons have been purchased at a cost of $7,398. They went into service on *December 20, 1979* and are for the sole purpose of transporting inmates for medical services outside of CCF.
>
> . . . . .
>
> 14. A new roof has been placed on cellhouse 3 *as of November 30, 1979.* The cost of this project was $58,790.
>
> . . . . .
>
> 21. Contacts have been made with Denver bridge and chess clubs in order to establish chapters within CCF.
>
> . . . . .
>
> 25. Psychiatric evaluations of prisoners in cellhouses 3, 7 administrative segregation, and 7 punitive segregation have been completed. A total of 140 evaluations have been made . . . . Immediate treatment needs of 35 of those inmates were identified (see attached exhibit C) and are currently being implemented. The Department of Institutions has *devised a plan* for the screening of the remaining inmates.

(Motion for Stay, at 10-14; emphasis added.) Finally, the plan was filed within the time schedule provided by the

court, after an extension of time requested by defendants in order that they would be able to meet the deadline. However defendants' counsel choose to characterize the plan, I will call it by its title, which is "Plan of Action."[2]

For the reasons discussed I find that defendants have failed to make a showing whether strong or substantial that they are likely to prevail on the merits of the appeal. I have reviewed my opinion and order line-by-line to see if there is any conclusion of law which might be error or even to see if there is any conclusion which is without precedent. I find none.

II

WHETHER DEFENDANTS HAVE SHOWN IRREPARABLE INJURY IF THE STAY IS NOT GRANTED

There is no showing that irreparable injury will result if the stay is not granted. The memorandum opinion and order requires good faith efforts to bring the corrections system into compliance with the federal constitution. The spectre of "closure . . . upon expiration of the forty-five (45) day stay of execution," (Motion for Stay, at 6) or

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[2]A somewhat similar approach was taken by Oklahoma officials in *Battle v. Anderson*. Defendants there argued that the trial court's order should not be allowed to infringe upon or add to a plan that the state had previously prepared. The United States responded "that, in fact, the Plan was not written until after the trial court's May 24, 1977, bench ruling and was not presented to the parties until June 13, 1977. The record," said the court of appeals, "confirms this contention." 564 F.2d at 401.

"premature release" of prisoners (Motion for Stay, at 7) is unfounded and chimerical. The matter of immediate closure has been discussed, and, as I said, it is a matter entirely up to defendants. No one has suggested or requested the premature release of prisoners, least of all me. The steps which defendants take to comply with their legal obligations will be viewed with substantial deference so long as they are taken in good faith. No more has been required and I could not, in good conscience, require less. As the trial court said in *Battle v. Anderson,*

> *The Court has only decreed that the . . . conditions . . . must be eliminated . . . The details and administration of a program are left solely to the discretion of the defendants. The Court is interested in ends and not means so long as they are lawful. Defendant further contends that the Order 'will unduly disrupt the orderly operation of the penal institutions of the State of Oklahoma.' This presumes that the prolongation of the unconstitutional conditions is essential to the 'orderly operation' of the system. The Court rejects the idea that constitutionality is incompatible with orderliness and that a constitutional operation is by definition disorderly.*

Quoted at 564 F.2d at 398.

The posture that defendants have taken regarding their plan makes all of this talk of irreparable harm a matter of gross speculation. According to defendants, the outlined actions are what they are going to do anyway, without any reference to what might be required. No one has reviewed the plan or commented upon it. If the plan represents a good faith effort and defendants continue that effort, which is what they say they are going to do anyway, where

is the irreparable harm imposed by this court? Defendants' motion is at the very least premature.[3]

III

WHETHER A STAY WILL SUBSTANTIALLY HARM THE OTHER PARTIES TO THE LITIGATION

In the motion for stay defendants deny the existence of any constitutional violations. The findings of fact were made, however, on the basis of a five week trial and, as has been repeatedly stated, on the basis of almost entirely uncontradicted evidence. If the unconstitutional conditions at Old Max such as inadequate medical care and treatment, pervasive idleness and lock down continue unabated pending appeal, it is certain that the plaintiff class will suffer substantially. There has already been another suicide, more self-mutilations and physical injuries to inmates since the order and under the conditions which have continued since the adjudication.

Defendants have presented a plan of action that they say they intend to pursue independent of this court's order. The assertion is nothing more than gross dissimulation. The truth of the matter is that the plan is a direct result of

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[3]As far as the amounts of money that might have to be spent to improve conditions at Old Max, I note that of the $1,122,915.40 that is mentioned in paragraph 31 at page 15 of defendants' motion as benefiting the present facility, $945,825, or 85 per cent, is for the purpose of increasing staff, not for physical improvements. Adequate staff will be just as necessary at the new facility as it is at Old Max. While I certainly found that inadequate staffing was one of the primary problems at the prison, I did not attempt to set out a required number of additional positions. Instead, deference was given to prison officials, who have had a free hand in calculating the number of staff that they believe required. The plan, it must be remembered, is at yet unexamined.

this litigation and this court's order. Defendants have set forth a number of steps that they say have been taken during the past seven months to improve conditions at Old Max. (Motion for Stay, at 9-16.) Such improvements are commendable but it is clear that those efforts began only several months prior to trial, and that the great bulk of them have taken place only since November. Such is not grounds for criticism of the efforts themselves but it belies their "independence" and suggests the importance of this court's continued jurisdiction. A stay of proceedings will, as demonstrated during the interim from November 15, 1979 to this date, cause substantial harm to the other parties to this litigation. While technically speaking the employees at Old Max are not parties to this litigation, I cannot help but observe that they, too, in all probability, may suffer substantial harm if proceedings are stayed.

What it comes down to is this: the balance that defendants ask me to strike is between substantial and continuing harm to plaintiffs on the one hand and defendants' dislike of any sort of compliance hearings on the other. I think it is evident, given the above discussion of the issues, that the balance must be struck in favor of plaintiffs.

IV

WHETHER THE PUBLIC INTEREST IS BEST SERVED BY GRANTING OR DENYING THE STAY

I have always entertained the somewhat wistful notion that the public interest is best served by dedicated observance to the rule of law on the part of government as well as individuals. Unless and until reversed by a higher court, the rules of law and orders implementing them remain in full force and effect and it thus seems that adherence best serves the public interest. We are all aware of the recent

horrible tragedy at the state prison in New Mexico. Compared with the estimated cost of rebuilding there, the costs involved in correcting the unconstitutional conditions at Old Max are a pittance. If conditions at Old Max continue unabated, I cannot say with confidence that such an occurrence there is unlikely. It has happened before. I hesitate even to mention the possibility, but this motion for stay requires me to do so.

Judge Bohanon addressed very similar matters in *Battle* v. *Anderson*. His responses supplement my own. Defendants suggest that the question of the stay in *Battle* is distinguishable, since Oklahoma did not contest the court's findings and conclusions. That is not correct. *See Battle v. Anderson,* 564 F.2d at 399, 400. Even if defendants were correct that Oklahoma did not contest the trial court's decision, I see little difference between concession on the one hand and uncontradicted evidence on the other. Defendants stipulated, for instance, that according to their own corrections studies, "the housing facilities at Old Max are totally obsolete and continued use can only lead to an ongoing series of challenges to the constitutionality of [such] use." (Revised Appendix I to Plaintiffs' Pretrial Order, No. 222, at 31-32.) They also stipulated that as of February 1, 1977, "the old maximum security prison was below current correctional standards for housing and programming in the following ways: a. Size of living units; b. Day space; c. Lighting; d. Ventilation; e. Life safety requirements." (Revised Appendix I to Plaintiffs' Pretrial Order, No. 17, at 3.) Paul Silver, a recognized corrections architect called as an expert witness by defendants, characterized the main living areas at Old Max as unfit for human habitation. The evidence was uncontradicted that at the time of trial there was a *maximum* of ten hours a week of on-site physician coverage at Old Max, even though defendants stipulated that "[a] minimum of 40

hours per week of on-site primary care physician coverage is needed for the Maximum Security Prison to meet minimally acceptable standards of health care." (Revised Appendix I to Plaintiffs' Pretrial Order, No. 341, at 59.) Defendants also stipulated that transitional workers remain in their cells approximately 20 hours a day, and that they cannot use the hobby shop. (Revised Appendix I to Plaintiffs' Pretrial Order, Nos. 1010, 1012, at 134.) The list could go on, but little additional purpose would be served.

Stripped of its hyperbole, the only basis asserted in defendants' motion for stay is that they would prefer not to be subject to continuing federal court jurisdiction. As a general matter, that is understandable. As I explained in the memorandum opinion and order of December 20, at pages 129 through 132, the United States District Court in Colorado has shown much concern for the principles of federalism and great deference toward state officials. But as I also said, regarding this case, "[e]xcept in fashioning the necessary relief, deference is no longer possible." *See Procunier v. Martinez,* 416 U.S. at 405-06, 94 S.Ct. at 1807; *Bethea v. Crouse,* 417 F.2d 504, 505-06 (10th Cir. 1969).

Extensive efforts were made to settle this case. A final proposed settlement was drafted, but certain constituent elements of the state government would not allow it, even though counsel for defendants now says publicly that he knew the state was going to lose anyway. The refusal to settle was certainly within defendants' rights and they may have found it the expedient thing to do. But the fact of the matter is that the case was jurisdictionally here and did go to trial. Now that the trial is over and judgment has been entered, defendants cannot avoid this court's continuing jurisdiction by wishing that they had settled after all.

[72] The history of prison litigation shows an unfortunate need for continued jurisdiction, *see, e.g., Newman v. Alabama,* 466 F.Supp. 628 (M.D.Ala.1979), *Battle v. Anderson,* 457 F.Supp. 719 (E.D.Okl.1978), *Holt v. Hutto,* 363 F.Supp. 194 (E.D.Ark. 1973), *aff'd in part, rev'd in part and remanded sub nom. Finney v. Arkansas Board of Corrections,* 505 F.2d 194 (8th Cir. 1974), and the Supreme Court has recognized the broad equitable power of lower federal courts to remedy continuing constitutional violations. *See Hutto v. Finney,* 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978). *Cf. Milliken v. Bradley,* 433 U.S. 267, 281, 97 S.Ct. 2749, 2757, 53 L.Ed.2d 745 (1977); *Swann v. Charlotte Mechlenberg Board of Education,* 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) (School cases). That does not create a presumption of bad faith, but there is no basis for relief from judgment in defendants' assurances that everything now will be okay.

For the foregoing reasons, and based upon the findings of fact and conclusions of law contained in the memorandum opinion and order of December 20, 1979, it is therefore

ORDERED that the motion for stay of proceedings is denied. It is further

ORDERED that defendants' motion to vacate order of February 6, 1980 which authorized expedited discovery is denied. It is further

ORDERED that plaintiff's motion to compel attendance at depositions and production of documents is granted.

All other orders including the emergency orders relating to medical care issued from the bench on November 15,

1979 and the order continuing the stay of execution of the order of closure are continued in full force and effect, Since it is obvious that defendants will now seek a stay of proceedings in the Court of Appeals, I will not set the matter for hearing concerning a review of defendants' plan of action at this time. I do expect, however, that discovery will proceed as ordered unless and until the Court of Appeals grants a stay of all proceedings.

No. 80-1329

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

FIDEL RAMOS, et al.,

Petitioners,

v.

The Honorable RICHARD D. LAMM, Governor of the State of Colorado, et al.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

INTRODUCTORY STATEMENT

The State of Colorado accepts the plaintiffs' statement regarding the parties, the decision below, jurisdiction, and the constitutional and statutory provisions involved. However, the action of the court of appeals requires a restatement of the question presented.

QUESTION PRESENTED

Did the court of appeals err in reversing the district court's order insofar as it applied to classification and idleness and in remanding the case to the district court to devise a new remedy taking into consideration the changes in conditions which had occurred since the time of trial?

SUPPLEMENTAL STATEMENT OF THE CASE

The statement of the case contained in the plaintiffs' petition for certiorari fails to state the context in which the present case was tried. As is detailed in the petition for certiorari filed by the defendants in this case (hereinafter the state), long before Fidel Ramos filed suit, the State of Colorado was committed to replacing its antiquated prison, the Canon Correctional Facility (CCF)[1] and completely restructuring its system of corrections. See the state's petition for certiorari in *Lamm v. Ramos,* No. 80-1340, filed February 6, 1981, at 2-3. Testimony at trial indicated that construction was under way on two new modular "state-of-the art" prisons costing over 18 million dollars. See defendants' exhibit 1137, a copy of which is contained in the appendix to the state's petition for certiorari at page A-143.[2] According to the evidence introduced at trial, the new facilities were to be completed by January or February 1981 (A.56). In fact, the new maximum security prison, the Centenial Correctional Facility, opened on December 22, 1980. The new close security prison, the Shadow Mountain Correctional Facility, opened on January 26, 1981.[3]

Colorado also established a new Division of Correctional Industries to combat job idleness and teach job skills. 1977 Colo. Sess. Laws ch. 223 at 903. The Department of Corrections instituted new rules and regulations to help insure inmate safety, adopted a new classification system (R. vol. 30 at 96), improved food and medical services (R. vol. 30 at 63), instituted a new diagnostic system (R. vol. 30 at 159), and broadened programs (R. vol. 37 at 78). All of these facts are relevant to a consideration of what, if any, remedy is

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[1] At the time of trial, Colorado's only maximum security prison for men was the Canon Correctional Facility. It is commonly called "Old Max." In this brief it will be referred to by its name, "CCF," or "the old prison."

[2] References marked A. ____, refer to the appendix to the plaintiffs' petition for certiorari. References marked A-____ refer to the appendix to the state's petition for certiorari.

[3] "Close security" is an intermediate designation between medium security and maximum security.

necessary to stop the violations which the district court found to exist at the old prison. *See, Holt v. Sarver,* 442 F. 2d 304, 309 (8th Cir. 1971).

The statement of the case contained in the plaintiffs' petition for certiorari does not accurately summarize the opinion of the court of appeals. In its opinion, the court of appeals stated (A.13):

> We conclude that in the areas of shelter, sanitation, food, personal safety, and medical care — the core areas in any Eighth Amendment claim, the district court's findings and conclusions of violations of the plaintiffs' rights are entirely justified and supported by the record. *We do not think, however, that the record in this case requires or justifies going into all of the concepts on penalogy pressed by the plaintiffs and adopted by the district court's opinion – the concepts of motility, classification, and idleness – since the shortcomings in these areas are not of constitutional dimension.* While there may be a point where abuse in these areas would constitute an actual violation of the Eighth Amendment guarantee, we hold that in this case, the present record and the findings on these subjects do not warrant the court's broad remedial orders (485 F. Supp. at 170) intruding into these areas of prison administration.

(emphasis added) (footnote omitted).

The statement of the case contained in the plaintiffs' petition is inaccurate because it fails to distinguish between the issues of liability and remedy. As the preceding discussion shows, the Tenth Circuit not only vacated the trial court's remedial order, but *it reversed the finding of liability in the areas of idleness and classification.*[4] In the argument opposing the plaintiffs' petition, these issues will be addressed separately.

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[4] The court of appeals also held that the evidence did not support the trial court's conclusion that prisoners were unconstitutionally deprived of a right to visitation (access) (A.40-45). As the plaintiffs do not contest this portion of the court of appeals' decision, the state will not discuss it further.

ARGUMENT IN OPPOSITION TO GRANTING THE PLAINTIFFS' PETITION FOR CERTIORARI.

A. THE TENTH CIRCUIT PROPERLY VACATED THE DISTRICT COURT'S REMEDIAL ORDER.

At the conclusion of its decision, the court of appeals vacated the district court's remedial order and remanded the case for further proceedings (A.54-57). This action was entirely appropriate, since portions of the district court's remedial order were erroneous, and other portions were outdated.

To understand the Tenth Circuit's actions, it is necessary to examine the structure of the district court's opinion. The heart of the opinion is the district court's conclusions of law. It held that the conditions of confinement at CCF were unconstitutional in six areas:

1. Physical environment (A.125)
2. Idleness (A.126)
3. Physical safety (A.125)
4. Health care (A.131)
5. Classification (A.133)
6. Access (both visitation and access to the courts) (A.138)

In its remedial order, the district court ordered that, "Old Max shall be closed. It will no longer be used to confine inmates either temporarily, permanently or on a standby basis." As a condition of obtaining a stay of the order of closure, the district court directed the state to prepare plans according to five principles (A.158-59):

1. Productive activity
2. Motility
3. Health
4. Integrity and safety
5. Coherence

These five principles reflected the first five areas in which the court had found liability against the state. (For some reason, no principle corresponded to access.) These principles will be examined individually.

The principles of health and integrity and safety are irrelevant to the issues before the Court, since they are not the subject of the plaintiffs' petition for certiorari.

The principle of coherence required that the state develop a coherent classification system (A.159). Because the court of appeals reversed the district court's finding of liability on this ground (see subsection C, *infra),* there is no need for the state to modify its present classification system. Consequently, this portion of the remedial order was properly vacated.

Similarly, the principle of productive activity was to be the remedy for the finding of liability on the issue of idleness. Since the court of appeals found that the amount of idleness at the old prison was not unconstitutional (see subsection B, *infra),* there was no need for a remedial order in this regard.

"Motility" (the district court's novel term) deserves special consideration. It relates both to the physical facilities (cells, some of which were too small) and idleness. Under this principle, no prisoner "may be housed in a cell of a size less than 80 square feet for more than 20 hours a day. If the confinement space decreases from 80 square feet the hours of confinement must be reduced proportionately" (A.158-59). There are several reasons why this portion of the remedial order was properly vacated.

First, in the Tenth Circuit, a prisoner is entitled to be housed in a cell containing sixty square feet. Eighty square feet is the standard of the American Correctional Association. *Battle v. Anderson,* 564 F.2d 388 (10th Cir. 1977). See *Bell v. Wolfish,* 441 U.S. 520, 543-44, n.27. (1979). Second, the principle of motility was completely inconsistent with the principle of integrity and safety. Security is the reason that some prisoners were kept in their cells for twenty hours

a day (see subsection B, *infra*). The implementation of the principle of motility would have required the state either to significantly reduce the prison population and remodel the prison to make larger cells (something it probably could not have done in the short time that the prison was to be kept in operation) or, alternatively, to let prisoners in cellhouses 3 and 7 out of their cells for several more hours a day, an unacceptable option considering the security risks involved. Given these realities, the principle of "motility" was properly vacated by the Tenth Circuit.

There is an even more fundamental reason that the remedial order was vacated. The order of the district court issued on December 20, 1979 (A.161). The Tenth Circuit stayed this order, except as it applied to health care, pending the state's appeal (A.3, n.1). The Tenth Circuit's decision was rendered on September 25, 1980, and the mandate issued in November 1980, after the petitions for rehearing were denied (A.59-61). By this time, almost a year had passed; construction on the new facilities was almost complete. The Tenth Circuit stated (A.57):

> [I]t is apparent that events have moved forward, that new measures have been taken, and whether the remedial order should stand or be modified should be reconsidered after further proceedings in light of changed conditions and this opinion.

Consequently, the court of appeals remanded the case to the district court.[5] In so ruling, the appellate court did not unduly restrict the powers of the district court. In fact, citing *Hutto v. Finney*, 437 U.S. 678 (1978), the court held that the district court's power to enter equitable orders was "broad" but must be "tempered by the public interest involved" (A.56).

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[5] The plaintiffs' assertion at pages 13-15 of their petition that the court of appeals vacated the trial court's remedial order because the state made "non-record assertions as to 'changed conditions'" is plainly incorrect. The record before the court of appeals was replete with references to the fact that new facilities were being built. See, *e.g.*, (R. vol. 33 at 5-47).

In *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977), this Court listed three criteria for use by federal courts in devising equitable remedies: (1) the remedy must be related to the conditions alleged to offend the constitution; (2) the remedy must be remedial in nature; (3) the remedy must "take into account the interests of state and local authorities in managing their own affairs, consistent with the constitution." The decision of the court of appeals fully complies with *Milliken*.[6] The court merely remanded the case to the district court so that it could determine: (1) what are the present conditions to which the remedy must relate; (2) is a remedy necessary; (3) what are the interests of the state, given the change in circumstances? Thus, the portions of the Tenth Circuit's opinion about which the plaintiffs complain are in no way inconsistent with the prior decisions of the Court.

B. THE TENTH CIRCUIT COURT OF APPEALS PROPERLY FOUND THAT THE EVIDENCE DID NOT SUPPORT THE TRIAL COURT'S CONCLUSION THAT THE DEGREE OF IDLENESS AT THE OLD PRISON WAS UNCONSTITUTIONAL.

The Tenth Circuit correctly ruled that the plaintiffs failed to establish that the level of idleness at the old prison was unconstitutional. Prisoners at the old prison were housed in five cellhouses.[7] Of these cellhouses, idleness was not a problem in cellhouses 1, 4, and 5, since the inmates assigned to these cellhouses were workers. The working inmates at the old prison, like the rest of us, spent the

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[6] *Milliken* is a school desegregation case. While the state does not concede that the remedies applicable to an eighth-amendment violation are the same as those applicable to a violation of the equal protection clause, there is nothing in the court of appeals' decision in the present case which is inconsistent with *Milliken*.

[7] Although the number of inmates assigned to the cellhouses varied from day to day, cellhouse 1, which had a capacity of 384, housed approximately 360 inmates all of whom had jobs (A.18). Cellhouse 4 was a minimum-security building located outside the walls of the prison. Cellhouse 5 was located under the infirmary and housed about 20 trustee inmates who worked at the infirmary. Additionally, some inmates with particular medical needs were housed in the infirmary building (A.18-19). Cellhouses 2 and 6 were torn down years ago and were not involved in this litigation.

majority of their working days on the job. On weekends, the gym and main yard were available for the workers' use eight hours a day (R. vol. 37 at 162-63). In the evening, workers could participate in educational programs (R. vol. 29 at 16). Workers were also eligible to use the hobby shop, which was unavailable to nonworkers (R. vol. 37 at 162-63; vol. 29 at 5-6). During daylight savings time, workers could participate in evening "yard."

At the old prison, idleness was an issue principally in cellhouses 3 and 7. Cellhouse 3, which housed only 86 prisoners, was used to house administrative segregation and protective custody inmates, none of whom was eligible to work. The cellhouse contained no members of the general prison population. Cellhouse 3 inmates were released from their cells only for showers, "yard," and visitation but they spent over twenty hours a day locked in their cells (A.85-86). The state notes, however, that the problem of idleness at cellhouse 3 has been resolved; the cellhouse 3 population has been moved to the new maximum security prison, where, because of the modular architecture, inmates are only required to spend eight hours a day (time when they are asleep) in their cells. See *Bell v. Wolfish, supra,* at 525, 543-44, n.27.

Cellhouse 7 housed three classifications of prisoners. Of its roughly 340 prisoners, about two hundred were "transitional workers" — inmates who were part of the general prison population, but who had not yet been given a job. The balance of the inmates in cellhouse 7 were, like the inmates in cellhouse 3, in protective custody or administrative segregation. Like the prisoners in cellhouse 3, the inmates in cellhouse 7 spent over twenty hours a day in their cells. All prisoners at CCF were housed in single cells. The problem of isolation in cellhouse 7 has been remedied by the opening of the new facilities.[8]

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[8] Idleness existed at the diagnostic unit, where all male prisoners assigned to the Department of Corrections begin their period of incarceration regardless of where they are ultimately placed in the Colorado prison system. Since prisoners are only placed in this unit for a relatively short period of time, the state will not disucss this problem further.

The idleness of prisoners in cellhouses 3 and 7 was not unconstitutional, since it was the result of an effort to keep the old prison safe for both inmates and security personnel. In 1977, when Allan Ault became the Executive Director of the Colorado Department of Corrections, he found himself in charge of a prison which was largely out of control. He testified, "I thought it was fairly tenuous whether or not the staff was going to maintain control over the institution" (R. vol. 30 at 36). He made his first priority getting control of the institution. This included a policy of requiring some of the more dangerous prisoners to spend 20 hours or more a day in cells in cellhouses 3 and 7. He also assigned CCF a new superintendent, William Wilson, a "very firm individual" who "believe[d] in strict discipline" (R. vol. 30 at 61; Vol. 37 at 68). Dr. Ault also revoked many of the liberal privileges which had been given to prisoners during the 1960's. He emphasized, however, that none of this was done as punishment. As he put it, "I think the worst punishment is to allow inmates to kill each other" (R. vol. 30 at 37).

Dr. Ault's plan of action was premised on completing as soon as possible the new maximum security facility and the new close security facility, where he knew the problems of violence and idleness would largely be eliminated. He testified (R. vol. 30 at 72-73):

> I think the new policies that we had to implement — to me we had to implement them because of the record of violence and murder at Old Max — have paid off. I knew it was going to be a long two years before the new facility could be completed, but there hasn't been a murder at Old Max in the last year. Violence rates are down.
>
> . . . .
>
> [O]ur first effort in the new facility and in our programming or actions at the Old Max, that was to keep people alive, inmates and staff, and I think it has been fairly successful.

Clearly, the idleness imposed on the inmates in cellhouses 3 and 7 was a direct response to the security needs of the institution. This Court has repeatedly stated that where prison officials feel that a measure is necessary as a security precaution, "it is enough to say that they have not been conclusively shown to be wrong in this view." *Jones v. North Carolina Prisoners' Labor Union,* 433 U.S. 119, 132 (1977); *Bell v. Wolfish, supra,* at 555. Since the evidence in the record failed to establish that the prison authorities were "conclusively shown to be wrong" in their belief that the imposition of idleness on the inmates in cellhouses 3 and 7 was necessary, as a short-term measure, for the security of the prisoners, the Tenth Circuit properly held that the trial court erred in finding liability against the state on this ground.

C. THE TENTH CIRCUIT CORRECTLY RULED THAT THE EVIDENCE IN THE RECORD DID NOT SUPPORT THE TRIAL COURT'S CONCLUSION THAT THE CLASSIFICATION SYSTEM IN EFFECT IN COLORADO WAS UNCONSTITUTIONAL.

In its memorandum opinion, the district court concluded, "Though capable of redemption, the classification system is presently unconstitutional" (A.137).[9] The Tenth Circuit found that the record did not support this conclusion (A.13). The Tenth Circuit was correct.

When Dr. Ault arrived in 1977, he was confronted with a prison that had no effective classification system. Immediately, remedying this deficiency became one of Dr. Ault's highest priorities (R. vol. 30 at 95-96). From his earlier experiences as a prison administrator in Georgia, Dr. Ault was aware of the dangers of classifying inmates on the

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[9] "Classification" refers to the system by which inmates are categorized by prison authorities. This categorization is used to determine what type of security is necessary for a particular individual, where he should be housed, and what programs would be most beneficial for him. Not at issue here is the subject of regressive classification. *Compare, Meachum v. Fano,* 427 U.S. 215 (1976).

basis of subjective judgments rather than hard data (R. vol. 30 at 11-16). Consequently, the Department of Corrections entered into a contract with Dr. Herbert Eber, with whom Dr. Ault had previously worked, to design a new classification system (R. vol. 30 at 96-97; vol. 36 at 46).

Dr. Eber's system utilizes a battery of tests which are administered in the diagnostic unit, to which all male inmates assigned to the Department of Corrections are initially sent. These tests include a grade level test, I.Q. test, vocational interest test, and a 16 personality-factor test, which measures personality factors and vocational traits (R. vol. 20 at 114-16; plaintiffs' exhibit 20). These tests not only measure educational and vocational possibilities for the inmate, but are used to predict escape risk and the dangerousness of the individual. The results of these tests are analyzed by a computer which prints a report in plain English. For example, in plaintiffs' exhibit 20, a model classification report, under the heading "security" the report states:

> Inmate Roe [a fictitous name] seems quite strongly given to violence, and should be considered dangerous and handled with caution. There seems to be no more than normal risk of escape, but security in that area should also be substantial.

The report also indicated that Roe was suicidal. See plaintiffs' exhibit 20, form K-40.

While Dr. Eber's computer assembles data based on test scores and generates reports in English according to its programs, it makes no decisions. Decisions involving the classification of inmates are made by trained specialists known as "programmers" (R. vol. 37 at 98). These programmers have the results of the tests, the prison's history at the prison (if any), and in two-thirds of the cases, a presentence report. The programmers also interview the inmate and talk with people who have dealt with him in special contexts (R. vol. 36 at 98). Dr. Eber's tests are designed to assist the programmer in determining whether a person is dangerous, a high escape risk, self-destructive, or

has serious adjustment problems. Decisions in other areas are based on information coming from other sources.[10]

The classification system is used to make two important classification decisions. Each prisoner is assigned: (1) a security designation which determines how much freedom he will be given within the prison; and (2) a facility classification which determines in which facility he will be housed. Prior to the opening of the new facilities, the difference between these concepts was very important. The old prison housed maximum, close, medium, and, in cellhouse 4, minimum security designated inmates. All the inmates housed at the old prison had the same facility classification, that is, CCF. Nevertheless, because of their different security designations, the prisoners were treated differently. (For example, only nonmaximum security designated inmates were allowed to work outside the walls of the prison.) With the opening of the new facilities, it has become possible to bring the security classifications and the facility classifications more closely into line.

The district court found the classification system to be arbitrary for two reasons. First, the district court agreed with the plaintiffs' expert social scientist who testified that the Eber tests had not been verified to his satisfaction and that, in the scientific community, the burden is on the proponent of a system until it has been proved to be valid (R. vol. 26 at 95; A.136). In so ruling, the district court apparently ignored the testimony of Dr. Eber who stated that his test had been used effectively in Georgia to predict excape risks (R. vol. 32 at 84, 187); were "a good predicter of violence in a prison setting" (R. vol. 36 at 81); and had been successfully used at a women's prison to predict suicide risks (R. vol. 36 at 77-78).

The federal courts do not sit to resolve battles between social scientists, but should, in matters of internal prison

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[10] Classifications are automatically reviewed every 90 days so that the inmate's in-prison conduct plays a role in classifications made after the initial classification decision.

policy which relate to security, defer to the expert prison administrators. *Bell v. Wolfish, supra* at 554; *Jones v. North Carolina Prisoners' Union, supra; Pell v. Procunier* 417 U.S. 817, 827 (1974); *Procunier v. Martinez,* 416 U.S. 396, 404-05 (1974). Therefore, the trial court's belief that the Eber system is not a good one and is not accepted in the social scientific community, is not a basis for declaring the system unconstitutional.

The trial court was also critical of Colorado's classification system because the Department of Corrections established certain guidelines regarding facility classifications which applied regardless of the Eber tests. For example, all prisoners who have more than six years remaining on their sentence until they are eligible for parole, are given a maximum facility classification (plaintiffs' exhibit 20 at 49-50). There is, however, nothing constitutionally impermissible in such a classification system, since it is based on the security needs of the institution as preceived by the experts charged with administering the prison. See *Bell v. Wolfish, supra.* As the Tenth Circuit stated in *Marchesani v. McCune,* 531 F.2d 459, 462 (10th Cir.), *cert. denied,* 429 U.S. 846 (1976):

> Prison setting is, at best, tense. It is sometimes explosive, and always potentially dangerous. The judgments of prison authorities, under such circumstances, are often predicated on "educated" estimates or guesses resting on suspicion.

See also, Meachum v. Fano, 427 U.S. 215, 224 (1976) (the initial decision to assign a convict to a particular institution is not subject to audit under the due process clause, even though the degree of confinement may be quite different in different institutions); *Montayne v. Haymes,* 427 U.S. 236 (1976).

In the present case, the record establishes beyond any question that prior to trial Colorado instituted a new, computerized, sophisticated classification system. This was, in part, an attempt to provide for internal security at the pris-

on. Since no more is constitutionally required, the Tenth Circuit properly held that the district court erred in finding liability against the state on the ground that it had an unconstitutional classification system.

CONCLUSION

For the reasons stated above, the state asks this Court to deny the plaintiffs' petition for writ of certiorari.

Respectfully submitted,

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